

DEC 3 1963

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FIRST NATIONAL FINANCE CORPORATION,
etc.

Appellee

vs.

100 NORTH LA SALLE STREET BUILDING
CORPORATION, et al.

Defendants below

On appeal of:

100 NORTH LA SALLE STREET BUILDING
CORPORATION, etc.

Appellant

100 NORTH LA SALLE STREET BUILDING
CORPORATION, etc.

Appellant

vs.

LA SALLE NATIONAL BANK, as Successor,
etc. et al,

Appellees

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

LA SALLE NATIONAL BANK, as Successor,
etc.

Appellee

vs.

100 NORTH LA SALLE STREET BUILDING
CORPORATION, etc. et al,

Defendants below

On appeal of:

100 NORTH LA SALLE STREET BUILDING
CORPORATION, etc.

Appellant.

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Leave to appeal "within one year" from judgments on its suit and two counterclaims for indemnity was granted petitioner, 100 North La Salle Building Corporation. Ill. Rev. Stat. ch. 110, § 76 (1959). The petition joins the Building Corporation suit against the La Salle National Bank, successor trustee, and Wilkinson & Company and J. C. Wilkinson, individually, with two counterclaims by the Building Corporation against the same Bank as successor trustee and a cross complaint against the First National Finance

84222


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Corporation, owner of 166 West Washington Building. After the trial court directed verdicts in favor of the Building Corporation and Chadwick, in the subrogation suits for damages against them, these indemnity claims were submitted to the court without a jury. The court found for the Bank, as defendant and counter-defendant, and for the Finance Corporation, as counter-defendant, and entered the judgments accordingly.

In this court the petitioner, Building Corporation, asks that if this court should reverse and remand the judgments for it and Chadwick on the negligence claims, it should also reverse and remand the judgments for the Bank and the Finance Corporation in the indemnity claims. The Bank and Finance Corporation in this court asked that the judgment in their favor on the indemnity claims should be reviewed on the merits.

We need not discuss the merits of the "indemnity claims." It is our opinion that the court should have deferred its judgment on these claims until the ultimate disposition of the negligence cases. When the trial court entered the indemnity claim judgments it had already directed verdicts in favor of the Building Corporation and Chadwick on the issue of liability for damages accruing out of the fire in the 170 West Washington Building. When the indemnity claims were submitted, therefore, there was not before the trial court the ultimate determination of the damages upon which claims for indemnity could be based.

Further, the record is not clear that the trial court intended to pass on the merits of the "indemnity claims" when it decided against the Building Corporation on them. And if the court did not pass on them, an injustice would result if we passed on



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3.

them now. It is no answer to say that the Building Corporation induced the court's judgment. When the decision was made there was no justiciable controversy, at least not completely, on the claims. If we were to decide the merits now, in the absence of hearing on damages, it is not unlikely that we would thereby piecemeal the litigation and later have the claims again before us. We conclude that the judgments were premature.

For the reasons given, the judgments are reversed.

REVERSED.

BURMAN AND MURPHY, J.J., CONCUR.

ABSTRACT ONLY.

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them now. It is no answer to say that the Building Corporation induced the court's judgment. When the decision was made there was no justiciable controversy, at least not completely, on the claims. If we were to decide the merits now, in the absence of hearing on damages, it is not unlikely that we would thereby piecemeal the litigation and later have the claims again before us. We conclude that the judgments were premature.

For the reasons given, the judgments are reversed and remanded.

REVERSED AND REMANDED.

BURMAN AND MURPHY, J.J., CONCUR.

ABSTRACT ONLY.

48172

GEORGE V. STANLEY,

Appellee

Vs.

ROBERT H. GARDNER, a minor and

HARRY H. GARDNER, individually

and as guardian ad litem of

ROBERT H. GARDNER,

Appellants.

APPEAL FROM

TOWN COURT OF CICERO

COOK COUNTY

1 SC I.A. 2J 107

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This property damage suit resulted in judgment on the pleadings, against defendants, after the trial court denied their motion to change venue and to dismiss for want of jurisdiction. Defendants appealed.

Plaintiff's automobile and that of Harry Gardner driven by Robert Gardner, a minor, collided in a Chicago intersection. Plaintiff began suit in the town court of Cicero and summons was served on defendants where they resided in Chicago. The court denied defendants' motions for transfer to a court of proper venue and to dismiss for want of jurisdiction of the subject matter.

The sole question is whether the town court of Cicero was the proper venue for this cause of action arising from a transaction no part of which occurred in Cicero, defendants not residing in Cicero and summons having been served outside of Cicero.

The Supreme Court of Illinois recently decided the case of People ex rel. Norwegian-American Hospital, Inc., v. Sandusky,

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No. 36158, Jan. 20, 1961. That was a petition for an original mandamus to compel a judge of the town court of Cicero to expunge an order denying a motion to transfer to a proper venue, an action based on tort, no part of which occurred in Cicero, and defendant neither residing in Cicero nor doing business there. The Supreme Court awarded the writ compelling the transfer of the case to the Circuit Court on the ground that the town court of Cicero was not the proper venue.

In opposing the application for the mandamus writ the defendant, Sandusky, raised the same questions that are raised in the case before us. The questions were answered in favor of the defendant.

The Sandusky decision controls the decision here. The town court of Cicero is not the proper forum for this suit. The judgment is reversed and the cause remanded with directions to order the transfer of the cause in accordance with defendants' motion.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURMAN AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.

1 p. 108
48193

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

NORMAN MENDOZA,

Defendant-Appellant.

APPEAL FROM
MUNICIPAL COURT OF
OAK PARK, ILLINOIS

301A-108 2d

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Defendant was charged with having stolen four Dodge spinner type hubcaps. The trial court found him guilty after a trial without a jury. He was sentenced to the House of Correction for one year and fined \$100.00 plus costs. On motion of defendant to vacate the judgment, the trial court, on April 16, 1960, sustained the finding of guilty and the judgment order for the fine and costs and he set aside the one year sentence in the House of Correction. Defendant appeals.

Defendant contends that there was a failure to prove that the four hubcaps charged in the information to have been stolen by him were actually the property, goods, and chattels of the complaining witness. He argues that there was a failure to prove the corpus delicti beyond a reasonable doubt and that the conviction should therefore be reversed.

On November 8, 1959, George Kouros, the complaining witness, parked his car at midnight in a gas station at the corner of Madison and Taylor Streets in Oak Park. At 7:00 or 8:00 o'clock the next morning he found his car had four flat tires and four hubcaps, valued about \$60.00, were missing. He subsequently went to the Oak Park police station and was present when the Police Captain questioned three boys, one of whom was defendant.

Two of the boys admitted they took the hubcaps. Mr. Kouros was shown four hubcaps which were taken from the trunk of the Chevrolet the boys were driving and which were introduced into evidence at defendant's trial.

At the trial Kouros said, "I can't identify these as my caps. They look like them." Police officers Stenger and McCloskey testified that on November 8, 1959, at 2:35 A. M., while riding in a squad car in the vicinity of the gas station, they noticed a car backing out of the alley onto Taylor Street. Two boys ran and got into the car, a 1957 Chevrolet with no rear license plates. They pulled alongside and put the spotlight on it, and saw one person at the wheel and two boys in the back seat of the car. The car pulled away from them at a high rate of speed and eluded them. They radioed other cars and in a short time they learned by radio that the car had been apprehended. They recognized the boys as the ones they saw at the gas station and after a search of the car found four hubcaps in the trunk of the car. They also noticed fresh blood stains in the car.

Officer Stenger testified that he noticed that defendant's hands were cut. Stenger further testified that Cragen, one of the three boys, stated at the police station that they had been to a drive-in restaurant, saw a car in the gas station, and decided to take the hubcaps; and that Cragen related that he and Mendoza each took two hubcaps and cut their hands taking them. Officer Stenger stated further that the boys admitted they had other hubcaps and that Mr. Kouros said his hubcaps had locks on them. Police Captain Nester of Oak Park testified he talked to the defendant and to his two companions in the station with Officer Stenger and Mr. Kouros present. Mendoza said they all had the idea of taking the hubcaps, and another boy said the tires went flat when they took the caps off.

Mrs. Helen Lynch testified that at 2:30 A. M., while in her home near the gas station, she heard scraping on metal and saw two figures taking hubcaps off the Dodge car. She called her husband, George Lynch, who testified that his wife called him over and through their window they saw two men flee ing in a Chevrolet car and a police car following them. Ten minutes later, Mr. Lynch said, he saw a Dodge with no hubcaps and four flat tires.

At the close of the People's evidence, the defendant moved for a not guilty finding, claiming that the state failed to prove him guilty beyond a reasonable doubt. When the motion was overruled the defendant elected to stand on his motion and offered no evidence. The court found the defendant guilty and sentenced him to one year in the House of Correction and fined him \$100.00. The trial judge vacated the jail sentence and let the fine of \$100.00 stand after hearing a motion for new trial. Neither this court nor the trial court relies on the judicial confession made after conviction to support this conviction.

Counsel for defendant demonstrated in open court during oral argument before us that the four hubcaps received in evidence did not have locks on them and therefore could not have been the property of the complaining witness. On this basis defendant argues there was a failure to prove the corpus delicti beyond a reasonable doubt and seeks to reverse the judgment. In support of this position defendant cites *People v. Wallace*, 303 Ill. 504; *People v. Maruda*, 314 Ill. 536; and *Bishop v. People*, 194 Ill. 365. In *Wallace* there was no evidence that defendant took hogs belonging to the complaining witness; in *Maruda* there was no proof of a larceny other than

defendant's extra-judicial confession, which he repudiated in court; in Bishop there was no evidence that wire sold by defendant was stolen from the complaining witness.

The theory of defendant that the State must prove that the hubcaps found in defendant's car and introduced in evidence were the property of the complaining witness is unfounded. These exhibits were not necessary to prove the crime charged. Defendant is not on trial for stealing these particular hubcaps, but for stealing hubcaps belonging to George Kouros. In the case at bar the defendant was seen at the place of the theft by two police officers about the same time that Mrs. Lynch and her husband saw two boys stealing hubcaps. The police officers and the Lynches testified that the boys fled the scene. Flight is also a circumstance which, considered with all the other evidence, tends to prove his guilt. *People v. Dukes*, 12 Ill. 2d 334. The defendant had ample time to throw the stolen hubcaps from the fleeing car before he was apprehended; it is not incumbent upon the State to find and introduce into evidence the stolen property when there is otherwise sufficient evidence to sustain the conviction, even if the other evidence is entirely circumstantial. See *People v. Russell*, 17 Ill. 2d 328. In addition, defendant made statements before several witnesses that he stole the hubcaps belonging to complainant. The Lynches testified that soon after the boys fled they saw a Dodge car stripped of four hubcaps with four tires flat, which was the condition of the Kouras car when the latter saw it. Thus we have evidence that a crime was committed and defendant linked directly to it. To establish the corpus delicti the test is whether the whole evidence proves that a crime was committed

and the defendant committed it. *People v. Miller*, 13 Ill. 2d 84, cert. den. 357 U. S. 943. We hold that the facts established the corpus delicti beyond any reasonable doubt.

The judgment and the fine are supported by the evidence.

JUDGMENT AFFIRMED.

KILEY, P. J. AND MURPHY, J. CONCUR.

ABSTRACT ONLY.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10320

Agenda No. 16

Coe Investment Company, a corporation,

Plaintiff-Appellant
and Cross Appellee,

vs.

G. Jay Boss,

Defendant-Appellee
and Cross Appellant.

21
Appeal from the
Circuit Court of
Sangamon County

ROETH, Justice.

On August 16, 1955, plaintiff confessed judgment in the amount of \$3,818.80 against defendant and his wife on a promissory note. Subsequently the judgment was opened up and defendants were granted leave to plead. The answer filed by defendants denied execution and delivery of the note and denied consideration for the note. Three affirmative defenses were filed. On this appeal we are only concerned with one affirmative defense. This alleged in substance that defendants were induced to execute the note for the purpose of showing their good faith of going into business with one Eddy Howard and upon condition that said note would not be used unless a certain loan which defendants had applied for at a bank was approved, and by plaintiff's officer

Abstract

A

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Report No. 1

March 10, 1966

TO : DIRECTOR, FBI
FROM : SAC, NEW YORK
SUBJECT: [Illegible]

Re New York letter to Bureau dated 2/24/66.

Enclosed for the Bureau are two copies of a letterhead memorandum (LHM) dated and captioned as above.

Very truly yours,
[Illegible Signature]

Enclosed for the Bureau are two copies of a letterhead memorandum (LHM) dated and captioned as above.

Very truly yours,
[Illegible Signature]

On March 1, 1966, [Illegible] advised [Illegible] in the

course of a telephone conversation that [Illegible] had been advised by [Illegible] that [Illegible]

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representing to defendants that the business of Eddy Howard was good, profitable and sound. It is alleged that the representations were relied on, that they were false and known to be so and that they were knowingly, wilfully and maliciously made by plaintiff's officer with intent to deceive the defendants. It is not contended by counsel for plaintiff that the allegations of the affirmative defense were not sufficient to allege fraud. Prior to trial the wife of defendant died and on plaintiff's motion the cause proceeded only as to defendant C. Jay Boss. The jury returned a verdict for defendant and answered nine special interrogatories in the affirmative. The answers to the special interrogatories were consistent with the general verdict. The basic questions presented to us by this appeal are (1) the verdict and answers to the special interrogatories are contrary to the manifest weight of the evidence and (2) the court erred in giving certain instructions.

The record before us reveals that Eddy Howard was in the business of buying and selling used automobiles. His brother, William Howard, the son-in-law of defendants, worked for Eddy Howard as a salesman. The plaintiff floor-planned Eddy Howard's purchases. In other words, when Eddy Howard would buy a used car plaintiff furnished the money and Eddy Howard would deposit the title certificate with plaintiff. When he sold the car he

would pick up the title certificate and deliver it to the purchaser and then settle with plaintiff for the amount due plaintiff as to that car.

Prior to the signing of the note in question on July 13, 1955, Eddy Howard had 5 used cars under the foregoing floor plan with plaintiff. On varying dates he had sold these 5 cars and had picked up the title certificates but had failed to thereafter make settlement with the plaintiff for these cars. These cars were noted on plaintiff's records as having been "sold out of trust".

On July 11, 1955, William Howard and his wife came to see the wife of defendant. They proposed that the defendants purchase 2/3 of Eddy Howard's business with an understanding that they would subsequently sell a 1/3 interest to William Howard, their son-in-law. Eddy and William were to carry on the business of selling used cars and defendant's wife was to be the bookkeeper. The same afternoon Eddy Howard called and then came to defendant's home and talked to defendant's wife. The tentative figure for buying into the business was around \$3,000.00, which sum was allegedly to be used to pick up 10 certificates of title on used cars, held by plaintiff. This was the amount of money allegedly owed to plaintiff on the 10 cars and when paid the parties would own the 10 cars and was the way defendants were to buy into the

business. Defendants had no cash or liquid securities and the only way they could obtain the necessary funds was to mortgage their home. The next day Eddy Howard and William Howard took defendant's wife to a bank where she applied for a real estate loan in the amount of \$3,300.00, the amount suggested by Eddy Howard. They were told that it would take several days before it could be determined whether the application would be approved.

In the late evening of the following day Eddy Howard, William Howard and defendant's daughter again came to defendant's home. On this occasion Eddy Howard presented defendants with the note in question in this suit. The note in question had previously been prepared by one Marge Veith, an employee of the plaintiff, at the direction of Sam W. Coe, the owner and president of plaintiff. The amount of the note was arrived at by a computation by her of the amount owed plaintiff by Eddy Howard for the 5 cars which had been sold out of trust. Eddy Howard told defendants that Coe wanted a confirmation that they intended buying into the business in order to hold the 10 cars and that the note wouldn't be binding unless their application at the bank for a loan was approved. It is a fair inference from the record that from this conversation with Eddy Howard, defendants were under the impression that they were executing the note in question to show good faith to plaintiff of their intention of

business. Defendants had no cash at hand connected with the
only way they could effect the necessary funds was to mortgage
their home. The next day they found an attorney named Cook
Defendants' wife to a bank where she applied for a cash advance
loan to the amount of \$1,000.00, the same amount as they
needed. They were told that it would require the bank
to credit the necessary funds, the bank would not be able to
do this because of the existing law books.
After some time and discussion, the bank agreed to advance the
loan. At this point the bank advanced the loan to the
bank where it was made in full. The bank is making the
advance from its own funds. It was made in full, and the bank
initially, at the time of the advance, the bank was not
of value. The bank is not a bank and is not a bank.
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doing what they supposed they were doing, namely, buying into the business by purchasing 10 car titles and that the note was to be subsequently returned and if their application for a loan at the bank was not approved the deal was off. It was not revealed to the defendants that the note was to be used to pay Eddy Howard's debt to plaintiff growing out of the sale of the 5 cars out of trust. With the foregoing assurances defendants signed the note.

The following day Marge Veith called the defendant's wife, at the direction of Sam W. Coe, to verify the signatures on the note. Marge Veith at this time was a cashier and steno clerk who checked credit, accepted payments on loan accounts, typed papers, made bank deposits, took applications for loans and approved the same. Defendant's wife testified that on this occasion she told Marge Veith, "You know this note isn't to be used unless we get a loan on the house" and that Marge Veith said she understood. The record shows that the latter conversation was denied by the said Marge Veith. The daughter of the defendants was present in her parents home at the time of the above alleged conversation and her version of what her mother said over the phone was that her mother said, "Those are our signatures" and also, "This is a confirmation that we are going into business on those cars" and, "No, that is just a confirmation that we are going to buy those cars".

The record further shows that at one time Eddy Howard had 12 or 14 used cars in a used car lot. At the direction of a Mr. Springer, who worked for Sam W. Coe, 7 or 8 of these cars were removed from Eddy Howard's lot and transferred to another lot. These cars had all been floor planned with the plaintiff. The remaining cars were old ones and not under floor plan to plaintiff. There is some dispute as to when this occurrence took place. One witness fixed the time as being about two weeks before July 13, 1955, and after the 5 cars had been sold out of trust and Mr. Springer fixing the time as sometime in August, 1955.

The alleged fraudulent statements alleged to have been made by Sam W. Coe were in response to a telephone call by the wife of C. Jay Boss, defendant, to Sam W. Coe. She testified that on July 12, prior to the note episode, she called Sam Coe to inquire about Eddy Howard's business and to find out if he was making money and was a good salesman. Sam Coe told her Eddy Howard was a very good salesman and that his business was making money. When she suggested they were thinking about going into business with Eddy Howard, Sam Coe suggested that Eddy Howard should discharge a certain salesman and should also sell lower priced used cars. He also said that as far as he knew the business was showing a profit and that it would be alright to go into

The first thing I noticed when I stepped out of the car was the heat. It was a sticky, oppressive heat that seemed to wrap around me. I had heard that the weather in the South was terrible, but I didn't realize it would be this bad. The humidity was like a heavy blanket, making it difficult to breathe. I had come here for a job, but I was starting to regret my decision. The people here were friendly, but their accents were so thick that I often had trouble understanding them. I had heard that the food was great, but I was starting to get sick of the same old, same old Southern fare. I was alone in a strange land, and I was starting to feel like an outsider. I had come here for a better life, but I was starting to feel like I was stuck in a never-ending cycle of struggle and hardship. I was alone, and I was starting to feel like I was losing touch with the world I had left behind.

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business with Eddy Howard. This telephone call to Sam W. Coe was made at the suggestion of defendant C. Jay Boss and the conversation was later communicated to him. Sam Coe did not take the witness stand to deny the foregoing conversation or in any way explain it.

L. y Counsel for plaintiff admit that Eddy Howard perpetrated a fraud upon defendants and that this fraud induced the defendants to execute the note in question. They contend, however, that Sam Coe was guilty of no wrongdoing. Consequently they reason, that there was no evidence to tie in Sam Coe with Eddy Howard's wrongdoing and that therefore the verdict is contrary to the manifest weight of the evidence. We do not subscribe to this line of argument. The evidence is ample in this record from which the jury could conclude that the business of Eddy Howard was in a precarious position and that Sam Coe was aware of this fact at the time he talked to Mrs. Boss. At that time Eddy Howard owed him \$3,300.00 for 5 cars sold out of trust. If the testimony of William Howard is believed by the jury, Sam Coe had undertaken, prior to July 13, to protect himself against further such defalcations by Eddy Howard, by taking possession from Eddy Howard of 7 or 8 cars under floor plan to plaintiff. The jury could well infer and conclude that Sam Coe saw an opportunity to recoup his losses on the 5 cars sold out of trust when he talked to Mrs. Boss

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and assured her that all was well with Eddy Howard. We are therefore of the opinion that the question of fraud on the part of Sam Coe was essentially a jury question and the verdict is not contrary to the manifest weight of the evidence.

[23] Plaintiff assigns as error the giving of defendant's instructions 1, 4, 5 and 6. Instruction #1 related to the affirmative defense of fraud. Instruction #4 related to the defense of lack of consideration and instructions #5 and #6 dealt in varying language with the question of delivery. As heretofore noted, there were multiple defenses relied upon by defendant. To intelligently instruct the jury it was necessary to cover each of these defenses by separate instructions. Courts of review have frequently stated that the function of instructions is to advise the jury of the pertinent law in language appropriate for its immediate application to the case, and the test is not what meaning counsel can at leisure attribute to them but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions considered as a series (Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 213; 158 N.E. 280). Many of the objections of counsel for plaintiff are hypercritical. We also consider the fact that this case has been tried three times. The first jury was unable to agree. The second jury

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Introduction 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 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found for the defendants and a new trial was granted. The jury upon the third trial likewise found for defendant. Undoubtedly, through three trials, the instructions bearing upon the issues have had a thorough screening by court and counsel. The instructions when considered as a series are sufficiently accurate to warrant our holding that no reversible error was committed.

[4,5] By a cross appeal defendant challenges the action of the trial court in setting aside the answer to Special Interrogatory #9. This interrogatory, which was answered in the affirmative, was:

"Were said representations made knowingly, wilfully and maliciously by Plaintiff through its officer or agent?"

The answer was set aside by the court on its own motion and both counsel appear to be in agreement that the basis for so doing, was that the trial judge was of the opinion that this finding, particularly as to malice, was against the manifest weight of the evidence. By another interrogatory the jury found that the representations were known by the plaintiff to be false. The action of the court as to interrogatory #9 does not therefore destroy the finding as to one of the basic elements of fraud. The determination of whether the answer to this special interrogatory was against the manifest weight of the evidence was primarily the function of the trial judge. On the record before us we are

not disposed to disturb the action of the trial court in this regard.

Accordingly the judgment of the Circuit Court of Sangamon County will, in all respects, be affirmed.

Affirmed.

Carroll, Presiding Justice, and Reynolds, Justice, concur.

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Abstract

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

21
301A.114

General No. 10331

Agenda No. 6

Joe Evans, doing business as Joe
Evans and Sons,

Plaintiff-Appellee,

vs.

Frank S. Owens,

Defendant-Appellant.

Appeal from the
Circuit Court of
McLean County.

REYNOLDS, J.

Joe Evans sued Frank S. Owens for the sum of \$1318.00 claimed to be the balance due him under an oral contract for work performed and materials furnished by the plaintiff to improve a certain street in Bloomington, Illinois. Originally, plaintiff furnished materials and did work on the job for one James Hastings, a son-in-law of the defendant's wife. Hastings did not pay, and at a meeting in the office of the defendant, there was an oral agreement made between the plaintiff and defendant for the plaintiff to finish the work on the street.

Admitted

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The plaintiff contends that the defendant agreed to pay the entire contract price for the job, including the amount owed by Hastings, and the defendant contends that he agreed to pay \$300.00 for the completion of the work and that there was no agreement on his part to pay for Hastings's debt. Plaintiff's records showed, that in addition to the amount of \$1042.00 owed by Hastings, the plaintiff, after the agreement with the defendant, performed services and furnished materials to the amount of \$522.75. The cause was tried before a jury and the jury found for the plaintiff and against the defendant and assessed the amount owed by the defendant to the plaintiff at \$1267.00. Judgment was entered upon the verdict and the defendant appeals to this court.

The defendant defended on the grounds that he did not assume the debt of Hastings and further that the Statute of Frauds controlled and the contract being an oral contract, he was not bound for the debt of Hastings. The pertinent section of the Statute of Frauds relied upon by the defendant provides that no action shall be brought to charge a defendant upon any special promise to answer for the debt of another person, unless the promise or agreement upon which said action is brought or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith. There is no dispute that

The plaintiff contends that the defendant agreed to pay the entire contract price for the job, including the amount owed by defendant, and the defendant contends that he agreed to pay \$200.00 for the completion of the work and that there was no agreement on his part to pay for the defendant's work. Plaintiff's records show, that in addition to the amount of \$100.00 owed by defendant, the plaintiff, after the agreement was made, and, performed services and furnished materials to the amount of \$225.75. The case was tried before a jury and the jury found for the plaintiff and against the defendant and assessed the amount owed by the defendant to the plaintiff at \$125.75. Judgment was entered upon the verdict and the defendant appeals to this court.

The defendant defends on the grounds that he did not assume the duty of defendant and further that the contract was voided and the contract being an oral contract, he was not bound for the debt of defendant. The defendant asserts of the facts of the case relied upon by the plaintiff and that he wishes that he should be charged a defendant and an appeal from the answer for the debt of another person, but that the promise or agreement upon which said action is brought or some representation or note thereof, shall be in writing, signed by the party to be charged therewith. There is no dispute that

the contract was oral, but the plaintiff takes the position that there was testimony that defendant received some benefits in the completion of the work on the street, and that an original agreement was entered into between the parties that would not be within the Statute of Frauds. Or, alternatively, that a novation was created, whereby the defendant assumed the original obligation of Hastings. In order to decide these questions it is necessary to examine the evidence. It is not disputed that James Hastings owed the plaintiff the sum of \$1042.00 for work and materials furnished; that Hastings did not pay the plaintiff; that the plaintiff had quit work on the project; that later, plaintiff met the defendant at the defendant's office and defendant promised to pay plaintiff \$300.00 to complete the work; that later, by a check drawn on his wife's account, defendant did pay plaintiff the \$300.00.

The testimony of the plaintiff that there was an agreement by the defendant to pay for the whole job, that is, Hastings' indebtedness to the plaintiff and the money necessary to finish the job, is flatly contradicted by the defendant. The agreement was made in the office of the defendant and no other person was present. The payment of \$300.00 is not in dispute but the method of payment and the place of payment is disputed. The

the contract was oral, but the plaintiff failed to produce
that there was testimony that defendant received some benefits
in the completion of the work on the road, and that an
original agreement was entered into between the parties that
would not be within the statute of frauds. Mr. Alderson said
that a question was raised, whether the defendant assumed
the original obligation of the plaintiff. In order to decide upon
questions it is necessary to examine the evidence. It is not
disputed that James Hastings owed the plaintiff the sum of
\$1042.00 for work and materials furnished; that Hastings did
not pay the plaintiff; that the plaintiff had paid out on the
project; that later, plaintiff had the defendant as one of his
men's office and defendant promised to pay plaintiff \$1042.00
to complete the work; that later, on a check dated 11/11/1917,
plaintiff's account, defendant did pay plaintiff the \$1042.00.
The testimony of the plaintiff that there was an agreement
by the defendant to pay for the work done, that is, Hastings
indemnified to the plaintiff was not shown necessary to prove
the job, as it is clearly established by the evidence. The agree-
ment was made in the office of the defendant and on about 1917
was executed. The amount of \$1042.00 is not in dispute but the
method of payment and the place of payment is in dispute. The

plaintiff testified that the defendant came to his house, pulled out a check book, wrote the check and handed it to him. The defendant's wife testified that the plaintiff came to her house in response to a call from her and picked up the check. That the check was made out by Mrs. Owens and that it was paid out of her account is borne out by other evidence.

Plaintiff contends that a novation of the original contract between the plaintiff and Hastings was created by the agreement between plaintiff and defendant Owens. To support this position the testimony must be clear and convincing. The establishment of a novation is an affirmative matter and the burden is on the party claiming the novation to establish it by clear and convincing proof. Novation is the substitution of a new obligation for an existing one and must be made by contract. Karraker v. Eddleman, 101 Ill. App. 23. As said in that case, page 29, "The original agreement of which novation is sought must be absolutely extinguished, and the new agreement substituted for it. The extinguishment of the original obligation constitutes the consideration for the new one. All the parties, not only to the new contract, but also to the one for which the new contract is substituted,

must consent to the novation; the parties to the original contract must consent in order to have that extinguished, and the parties to the new contract in order to have a valid obligation substituted for the old." In Hofman v. Chicago League Ball Club, 195 Ill. App. 249, the essential requisites of a novation were held to be a previous valid obligation, the agreement of all the parties to a new contract, the extinguishment of the old contract and the validity of the new one. Novation is never presumed but is an affirmative defense and must be proved by clear and competent legal evidence. Burnett v. West Madison State Bank, 375 Ill. 402. In this case there is no evidence to show that Hastings assented to the substitution. Intent is another necessary element of novation and the defendant denies not only the substitution but any intent to substitute. Day v. Wallace, 339 Ill. App. 573. The complaint does not allege a novation, but an original undertaking on the part of the defendant. It is the opinion of this court that the necessary elements of novation are lacking in this record and that the trial court erred in submitting to the jury Plaintiff's Instructions No. 1 and 5. Neither of these instructions was a correct

statement of the law as to novation and they are further erroneous for the reason that taking the evidence of the plaintiff as true, the evidence fails to show novation.

If there was no novation, the plaintiff as an alternative, contends that a subsequent original agreement was made between the parties, a part of which involved the defendant agreeing to pay the outstanding indebtedness of Hastings to the plaintiff. To take this new contract out of the Statute of Frauds, plaintiff takes the position that the defendant received additional consideration for the new contract. To support this contention that the defendant had an interest in the completion of the street work and there was a valid consideration for the inclusion of the debt of Hastings to the plaintiff, the plaintiff presented evidence that the defendant was a trustee for certain property on the street and that Hastings was the son-in-law of the defendant's wife. There was some attempted testimony to show that Mrs. Owens was an officer of a corporation known as Jim Hastings, Inc. but nothing definite was shown in this regard. There was no evidence that the defendant was in any way connected with Jim Hastings, Inc. There was some evidence as to a surety bond by

the defendant in connection with the street work, but again, the record fails to show any definite connection of the defendant with the street project.

The burden of proving that the new agreement in which the defendant promised to pay not only the cost of completing the job, but the existing indebtedness of Hastings, is an affirmative matter and the burden of proving it is upon the plaintiff. This proof must be by clear and competent legal evidence. Undoubtedly, there was a new and subsequent agreement between the parties to complete the work on the street. Whether it was for \$300.00, or any limitation of cost was agreed upon, is immaterial. According to plaintiff's records, he furnished labor and materials to the amount of \$522.75, based upon this part of the agreement. For this he has been paid \$300.00 leaving a balance due him for this work of \$222.75. The question of the defendant assuming the payment of Hastings' indebtedness in the new agreement is one where the plaintiff says he did and the defendant says he did not. The weight of the testimony is even. The evidence as the interest of the defendant in the completion of the street, or the relationship of the defendant's wife to Hastings, while inferential of an

interest on the part of the defendant, is not sufficient to prove an essential element in the plaintiff's case, namely, that there was a consideration flowing to the defendant from the new agreement, making the new agreement an independent and original liability on the part of the defendant. Assuming that the defendant entered into a new agreement for the completion of the street work by the plaintiff, this only binds him for the payment of this new work. Unless it can be proved that there was a legal consideration for him to assume the payment of Hastings' debt to the plaintiff, the agreement, if made as claimed by the defendant, still comes within the Statute of Frauds and cannot be enforced by the plaintiff. A promise to pay the debt of another is within the Statute unless it is founded upon a new and independent consideration passing between the newly contracting parties and independent of the original contract. In the absence of such a consideration the promise is collateral. And a collateral promise whether made before or after or contemporaneous with the promise of the primary or original debtor is void unless in writing. Laughlin v. Dalton, 200 Ill. App. 342. The promise to pay the debt of another after the same is incurred is void unless made upon a consideration

and reduced to writing. Lake View Hosp. Assn., etc., v. Nicholson, 202 Ill. App. 205; Raveret-weber Printing Co. Inc., v. Wright, 301 Ill. App. 421. A collateral undertaking to pay the debt of another, without any benefit moving to the promisor, not in writing, is void under the statute. Blasdel v. Erickson, 157 Ill. App. 615.

Here the evidence of an interest of the defendant in the street improvement is vague and uncertain at best. The testimony of the plaintiff that the defendant undertook in the new agreement to pay the debt of Hastings, is given full credit, is contradicted by equally credible evidence of the defendant that he did not so agree; that he agreed to pay the \$300.00 for the new work, and that the debt of Hastings was not mentioned or discussed. To take the alleged agreement of the defendant to pay Hastings' debt to the plaintiff out of the Statute of Frauds, a new consideration had to be proved, or there had to be shown a benefit moving to the defendant, that would import a consideration. This the plaintiff has failed to prove.

The judgment is reversed and remanded with instructions to enter judgment for the plaintiff and against the defendant in the amount of \$222.75.

Reversed and remanded with directions.

CARROLL, P.J. and ROETH, J., concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A.D. 1961

FILED

PAUL V. WUNDER
Clerk Appellate Court Second District

ROBERT C. JAHNKE, a minor, by and
through his father and next friend,
CLARENCE JAHNKE,
Plaintiff-Respondent,

vs.

TWELVE AND TWENTY-TWO CORPORATION,
a corporation,
Defendant-Petitioner.

Petition for Leave
to Appeal from the
Circuit Court of
Lake County from
an Order Granting
New Trial.

2d
1301A-118

CROW, P. J.

The defendant, Twelve and Twenty-Two Corporation, a corporation, has appealed, pursuant to a petition for leave to appeal, granted, from that part of an order of March 25, 1960 of the Circuit Court of Lake County allowing the plaintiff's post trial motion for a new trial as to this defendant and granting a new trial as to this defendant. No brief has been filed by the plaintiff, Robert C. Jahnke.

Complaints were filed in the court below on behalf of the plaintiff, seeking damages, on the ground of negligence, from the driver of an automobile, Frank Douglas, and, under what is commonly referred to as the dram shop act, from two separate defendants at whose establishments Frank Douglas had allegedly purchased or been given alcoholic liquor prior to the accident. The complaints were filed in two separate suits which were consolidated for trial.

The jury returned a verdict finding the defendant Frank Douglas guilty and assessing damages, and finding the defendant Twelve and Twenty-Two Corporation and the other defendant not guilty. A special interrogatory had been submitted to the jury, without objection by the plaintiff, and the jury made a special finding thereon that Frank Douglas had not been sold or given alcoholic liquor by this defendant. The general verdict and the special finding of fact on the special interrogatory were, therefore, consistent. Judgments were entered on this verdict the day that it was returned, March 16, 1960.

Then a post trial motion for new trial or judgment notwithstanding the verdict was filed by the plaintiff. The plaintiff's post trial motion alleged, so far as material, that the verdict was contrary to the law and the evidence; it was against the manifest weight of the evidence; there was no evidence to support the verdict in favor of this defendant; and the evidence affirmatively established that the defendant, Twelve and Twenty-Two Corporation, sold or gave alcoholic liquor to Frank Douglas.

The defendant contends that in the absence of any specific objection to the special finding of fact by the jury on the special interrogatory the plaintiff and the trial court were conclusively bound thereby, and, therefore, the trial court could not, as a matter of law, grant the plaintiff a new trial as to this defendant.

The special interrogatory was, of course, on a material question of fact: CH. 110 ILL. REV. STATS., 1959, par. 65, and the finding thereon is decisive of an essential fact upon which liability, or no liability, of this defendant depends.

The plaintiff's post trial motion did not mention the special finding of fact on the special interrogatory, or raise any

[illegible]

question as to or make any objection to the special finding of fact, nor did the plaintiff move separately to set aside the special finding of fact. The question is not preserved by the general objections in the post trial motion that the verdict is contrary to the law and evidence, or the manifest weight of the evidence, or that there was no evidence to support the verdict for this defendant, or that the evidence established this defendant sold or gave alcoholic liquor to Frank Douglas. A party is conclusively bound by a special finding of fact by a jury in answer to a special interrogatory unless specific objection thereto is made in or the question is raised in the trial court in the party's post trial motion or motion to set aside the special finding of fact. The objection to a special finding, in order to be effective, must be specific: WESTLUND v. KEWANEE PUBLIC SERVICE CO. (1956) 11 Ill. App. (2) 10; RUBOTTOM v. CRANE CO. (1939) 302 Ill. App. 58; TAAKE v. EICHENORST (1931) 344 Ill. 508; BEIMIE v. BELDEN MFG. CO. (1919) 287 Ill. 11; BRANT v. C. AND A. R.R. CO. (1920) 294 Ill. 606.

We are of the opinion that, under the circumstances, because of the failure of the plaintiff specifically to object in some proper manner to the special finding of fact on the special interrogatory, both the plaintiff and the court are conclusively bound by the special finding of fact.

Accordingly, therefore, the order of the Trial Court to the extent it allows the plaintiff's post trial motion for a new trial as to this defendant and grants a new trial as to this defendant is reversed and this cause is remanded with directions to

[illegible]

It is not possible to say whether the above is the exact or approximate value of the total cost of the project. The above is only an estimate of the cost of the project. The actual cost of the project will be determined by the results of the project.

deny the post trial motion as to this defendant and enter judgment on the verdict in favor of this defendant.

REVERSED AND REMANDED,

With Directions.

Spring, J. Concurs.
Wright, J. Concurs

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PAUL V. WUNDER
Clerk Appellate Court Second District

NO. 11425

Abstract

Abstract

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1960

1st DIVISION

60PV

JESS G. KELSEY, doing business as
K & K Cleaners,
Plaintiff-Appellee,
vs.
A & E MACHINERY CO., INC., a
corporation,
Defendant-Appellant.

Appeal from the
Circuit Court,
Winnebago County.

30 T.A. 110²⁴

McNEAL, J. -

This is an appeal by the defendant, A and E Machinery Co., Inc., from a judgment for \$5000 entered on a verdict in favor of the plaintiff, Jess G. Kelsey, doing business as K and K Cleaners.

Plaintiff Kelsey was the operator of a dry cleaning establishment and had been engaged in that business for about thirty years. On February 14, 1957, defendant sold plaintiff a "30 lb. synthetic dry cleaning unit complete with still, filter, pump, cooker" for \$5225, under a conditional sales contract. Other equipment included in the contract consisted of a Lattner boiler, a McDonnell-Miller control, a Minneapolis-Honeywell Pressuretrol, a Wilson-Below down tank, and a Kewanee-Ross cooler. The total sales price was \$7,394.06 and \$1186.92 was added as a finance charge. Plaintiff paid \$100 and was allowed \$700 for trade-in equipment. The balance amounting to \$7780.98 was covered by plaintiff's judgment note, which provided for payment in thirty-six monthly installments. The printed portion of the contract recites that "No other agreement, oral or written, express or implied, has been made by either party, with the exception of the agreement on the reverse side which is made a part hereof." Included in the additional agreement on the reverse side is a provision that

"Buyer acknowledges that no warranties, representations or agreements not expressed herein have been made by the Seller."

In his amended complaint plaintiff alleged that defendant represented that the unit was "a thirty (30) pound synthetic dry cleaning unit," that plaintiff relied on such representation and warranty and purchased the equipment, that the equipment was defective and not as represented or warranted, that the unit was not capable of handling thirty pounds of dry cleaning, that it had been rebuilt and the pipes which fed the cleaning liquid into the machine had been reduced in size so that they would not carry sufficient liquid to handle a thirty pound load, that the motor had been replaced with a smaller motor which would not furnish enough power to operate the unit when loaded with thirty pounds of clothes, and that the most the unit would clean without repeated breakdowns was twenty pounds, or one-third less than the capacity represented. Plaintiff claimed \$810.85 expended for repairs, \$592.46 for other expenses, and \$5634 for a daily loss of about 90 pounds of dry cleaning business. Defendant admitted the sale of the unit as described, but denied the representation alleged, and that the machine was defective and not capable of handling thirty pounds of dry cleaning.

On appeal defendant urges the following points: (1) that the amended complaint is based on an express warranty and the proof evidences an implied warranty, (2) that defendant's motions for a directed verdict at the close of plaintiff's case and for judgment notwithstanding the verdict should have been allowed, (3) that where the contract stated certain guarantees and excluded all others, breach of an implied warranty was untenable unless the contract was obtained by fraud, (4) that where an article is sold under its trade name, there is no implied warranty as to its fitness, (5) plaintiff had the burden of proving damages arising out of the breach of warranty and such proof may not be subject to guess or speculation, and (6) that where the failure of the machine to perform was caused by plaintiff, there can be no breach of an implied warranty.

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Points 1, 3, 4 and 6 are not mentioned in defendant's post-trial motion. Section 68.1 (2) of the Civil Practice Act provides in part: "The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof * * *. A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." Points 1, 3, 4 and 6 were not specified in defendant's post-trial motion and they are not available for review in this court. *Richman Chemical Co. v. Lowenthal*, 16 Ill. App. 2d 568, 572.

Defendant refers to implied warranty in several of the points urged on appeal. Plaintiff states that he pleaded and proved an express warranty and the case was tried on that theory. From our examination of the record we conclude that the case was tried below on the theory of an express, and not an implied, warranty, and it follows that the parties are restricted to that theory on review.

In connection with the second point that defendant's motions for directed verdict and for judgment notwithstanding the verdict should have been allowed, appellant contends that in the sale of this 30-pound cleaning unit there was no indication to the purchaser that the machine will clean 30 pounds every 30 minutes, or every hour or every two hours. However, the evidence discloses that this machine was equipped with a cylindrical basket 30 inches in diameter and 19.5 inches in depth designed to hold 30 pounds of dry clothes, and a clock which controlled a 45-minute cycle of automatic operation, washing for 20 minutes, extracting solvent for 5 minutes, and drying for 20 minutes. During the washing process, 30 to 40 gallons of perchloroethylene solution weighing about 14 pounds per gallon was pumped into the washer, and from the washer through a filter and back into the washer. The solution was extracted from the clothes by spinning the basket at 500 to 750 revolutions per minute. During the drying cycle the basket was operated in both directions in order to tumble the clothes. Once a week the solution was

purified or reclaimed by running it through the cooker and still. On February 14, 1957, when defendant's salesman, Bill Haiges, sold plaintiff this 30-pound used Martin dry cleaning unit, he told him that it had been used about six months by a man who needed larger equipment, but he assured plaintiff that the machine was in good operating condition. From these facts and circumstances in evidence the jury could have concluded that defendant's salesman represented and warranted that the cleaning unit was a 30-pound machine, i.e. that it had the capacity to clean 30 pounds of clothes each 45 minute cycle of operation. Any affirmation of fact tending to induce the buyer to purchase was an express warranty. Uniform Sales Act, section 12; Lindroth v. Walgreen Co., 329 Ill. App. 105, 115.

The equipment was delivered to plaintiff's premises about two weeks after the contract was made. The cleaning unit had been rebuilt and repainted. By March 17 the equipment had been assembled and Haiges suggested trying the machine with 25 pounds. It operated an hour or two, and then according to plaintiff the machine went "hay wire", and it blew rubber diaphragms as fast as Haiges could put them on. He ran out of diaphragms and had to put a tire patch on one. The machine broke down the next day, or the day after. It still wasn't operating by April 10, when the first installment on plaintiff's note became due. His note had been negotiated to Walter E. Heller Company. Plaintiff told Haiges and the finance company that the machine was no good, and that he didn't want the machine. The finance company threatened to auction the machine off for \$1500 and to put a judgment against plaintiff for the balance, and thereby compelled him to pay the note in full. On April 13 when defendant couldn't get the machine to work without blowing diaphragms, the system for operating the valves was changed from air pressure to water pressure.

Then the switches on the extractor started burning out.

There are four motors on the machine, one each for the extractor, the fan, the cylinder, and the pump. When the unit got around to extracting, the

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switch would stick and if the overload failed to throw out, the motor would burn out. Plaintiff purchased three new switches and defendant furnished some new ones. The next trouble was burned out coils, and then the shaft that pulled the machine when it was in extraction snapped. Defendant replaced the first shaft. The machine was out of order three weeks. Four months later that shaft broke and plaintiff furnished the next shaft, which cost \$76. Next, the bearings burned out. Plaintiff testified that there's hardly anything on the machine that hasn't been repaired or replaced.

In addition to these symptomatic minor defects, from plaintiff's diagnosis, as shown by an additional abstract, it appears that the fundamental trouble with this unit was that it was not capable of cleaning 30 pounds of clothes on one cycle of operation. The machine was originally designed for one inch pipe to carry the cleaning solution. In rebuilding the machine defendant reduced the size of the pipe to three-quarters of an inch. With smaller pipes the flow of solvent to the washer was reduced, the pipes clogged with lint, and the pressure caused the line to disconnect where the solution ran through plastic hoses. Forty gallons of solvent were lost on two occasions. Defendant furnished some inch fittings, and then the original inch line was restored. This restoration permitted ample solution in the washer, but with a 30-pound load the motor ran hot and the extractor stuck practically every time. With the weight of the clothes saturated with the solution, there was not power enough to start it into extraction. With 20 pounds in the basket, the clothes wadded up and got heavier on one side, throwing the basket off balance and causing the whole machine, in fact the whole building, to shake, the bearings to burn out, the shaft to break, the switches and everything else to go "hay wire". Although a number of defendant's employees testified that they worked on the machine, none of them tested it when loaded with 30 pounds of clothes. Some of them testified that the machine operated satisfactorily empty.

In *Hulke v. International Mfg. Co.*, 14 Ill. App. 2d 5, 46,

this court said: "On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant either a motion for directed verdict, or judgment notwithstanding the verdict. Lindroth v. Walgreen Co., 407 Ill.121, 130; Beverly v. Central Illinois Electric & Gas Co., 5 Ill. App. 2d 27, 36. The trial court may only grant judgment notwithstanding the verdict if, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. Heideman v. Kelsey, 414 Ill. 453, 457; Hall v. Chicago v. Northwestern Ry. Co., 5 Ill. 2d 135, 140." There is ample evidence in this record tending to prove plaintiff Kelsey's case and to support the jury's verdict in his favor. The trial court properly denied defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

Under his fifth point appellant contends (1) that plaintiff was not entitled to recover damages for loss of profits as a matter of law, and (2) that the verdict was not supported by any evidence as to damages. However, the first contention was not raised in the trial court. In his amended complaint plaintiff asked for damages on account of his inability to take care of 90 pounds of dry cleaning per day which caused a loss of \$5,634. Defendant filed no motion to strike this claim. The only instruction given the jury concerning damages was tendered by defendant. This instruction cautioned the jury not to award exemplary or vindictive damages, but did not preclude an award for loss of business. Further, this contention was not specified in defendant's post trial motion or suggested in the points made in appellant's brief. Argument should be limited to the points contained in the division in the brief captioned Points and Authorities. Appellate Court Rule 7.

As to proof of damages, plaintiff testified that his expenses for repairs, lost solvent, extra cleaning and driver, and repurchasing old equipment, occasioned by the defective machine, amounted to \$762.91. And since the machine would clean only 20 pounds of clothes per hour instead of 30 pounds per hour as represented, plaintiff also claimed that he lost compensation for 90 pounds each day at ten cents a pound, or \$9.00 a day. On this basis the jury apparently awarded plaintiff damages for a period of about fifteen months. Defendant complains that there was no evidence that plaintiff had sufficient business to require a machine that would clean an extra 90 pounds a day and none as to his volume of business before or after the purchase of the machine. On the contrary, the record shows that when plaintiff purchased this machine he was cleaning 200 to 300 pounds of clothes a day, including 50 to 300 pounds a day for Haines Cleaners, and that he had an agreement with Barrelli and another man to do all of their cleaning, all at ten cents a pound; and that when the new machine did not perform as represented Barrelli took his cleaning elsewhere and plaintiff had to take his cleaning to Barrelli and other cleaners. We cannot say that there was no evidence to support the verdict.

Of the errors properly preserved for review by this court, we find none sufficient to warrant a reversal. Accordingly the judgment of the Circuit Court of Winnebago County is affirmed.

Affirmed.

SMITH, P.J., and DOVE, J., concur.

48160

MARIE KUHNERT, Administratrix of
the Estate of CHARLES W. KUHNERT,
Deceased,

Appellant,

v.

KENNETH R. WHALEN,

Appellee.

APPEAL FROM CIRCUIT COURT
COOK COUNTY

30 I.A. 2d 158

MR. JUSTICE FRIEND delivered the opinion of the court:

Plaintiff brought suit under the Wrongful Death Act (Ill. Rev. Stat. 1959, ch. 70, §§ 1-2) to recover damages occasioned by the alleged negligence of defendant in the operation of his automobile which collided with a car driven by decedent, resulting in the latter's death. At the close of plaintiff's case, the court directed a verdict for defendant, and after denying a motion for a new trial, entered the judgment from which plaintiff appeals.

It appears that on the night of December 30, 1953, shortly before nine, defendant was driving his automobile in a westerly direction on 127th Street at or near its intersection with Ridgeland Avenue in Worth Township, Cook County, Illinois. Decedent was driving his automobile in a northerly direction along Ridgeland Avenue. A collision ensued at the intersection. There were no eyewitnesses for plaintiff, but William Garber, a part-time police officer of the Village of Worth, testified that he knew decedent "as well as [he] knew any business man in town," that on the night in question he was informed by police radio of an automobile accident

occurring about a mile south of the village limits, and thus out of his jurisdiction, but that as a matter of curiosity he went to the scene. The state police were already there; Garber did not make any inquiries of them regarding the accident, but he and his partner helped them out by directing traffic. Garber took no notes and made no report. Upon his arrival at the scene he saw two cars which were identified as those of decedent and defendant. There was a stop sign on Ridgeland Avenue protecting 127th Street and requiring cars on Ridgeland to stop. Visibility on both roads was good. He did not examine the scene for skid marks, nor did he look for debris that would indicate the point of impact, but he was of the opinion that the accident took place in the northeast quarter of the intersection. He made his determination through overhearing defendant talking to some people at the scene, but he made no attempt to learn their identity. Garber had never driven with decedent, and had seen him operate an automobile only on coming to or leaving the store he operated in the Village of Worth. There was no stop sign in the immediate vicinity of the store, and Garber stated on cross-examination that he did not remember ever having seen decedent stop at a stop sign while driving an automobile; nevertheless, he ventured the opinion that decedent was "a careful driver."

Earl J. Keate, another of plaintiff's witnesses, was a good friend of decedent and his wife; they were members of the same bowling team. He had driven with plaintiff eight or ten times to and from the bowling alley. He stated that their

bowling alley set up a "beer frame" for members of the team, and he recalled having seen decedent drink beer while bowling, but never more than two bottles in the course of an evening.

Much of the remaining evidence consisted of a pre-trial discovery deposition given by defendant. It was plaintiff's theory that the facts elicited in the deposition constituted admissions under Supreme Court Rule 19--10 (2) (b) (Ill. Rev. Stat. 1959, ch. 110, § 101.19--10 (2) (b)). The deposition was allowed to be read, over the objection of defendant. It showed, inter alia, that on the night of the accident decedent, alone in his 1952 Nash Rambler station wagon, was driving north on Ridgeland Avenue. Defendant, accompanied by his fiancée, was driving his 1951 Ford convertible west on 127th Street, a protected highway, at thirty to thirty-five miles per hour. At Ridgeland, a dark object, which later proved to be plaintiff's automobile, "flashed" in front of defendant's car in the intersection. The right front corner of defendant's car brushed the right rear of decedent's automobile. Defendant did not see deceased's car until just at contact, and then identified it only as "a flash" or "an object"--something that "interrupted" his headlights. After continuing on a short distance he became aware of a "clinking" sound in his car, turned around and drove back on 127th to Ridgeland, where he made a left-hand turn onto Ridgeland; when he was about sixty feet north of the intersection his headlights picked up a car in a ditch on the east side of the road--he then

realized that it was a car that had "flashed" in front of him. On investigating, he found no one in the car, but discovered decedent, apparently unconscious or dead, lying on the ground some fifteen feet south of the car. At the time of the occurrence defendant's lights were on; he heard no horn, nor did he hear brakes being applied.

There was no other testimony. Plaintiff did not call defendant as an adverse witness. Defendant's fiancée, whom he subsequently married, was not called, nor were the state police officers who investigated the occurrence. On the foregoing evidence, the court directed a verdict, and stated to the jury: "I can't see that there is any evidence here of negligence on the part of the defendant at all; and, consequently, since the burden is upon the plaintiff to prove negligence before it can recover, I don't see that there is any question for the jury to pass on."

Defendant clearly had the right of way, there were no obstacles anywhere along the intersection, and no evidence as to whether decedent stopped his car, as he was required to do before entering upon or crossing a protected highway. The speed at which defendant was proceeding in a westerly direction along 127th Street--thirty to thirty-five miles an hour--was not unreasonable. The lights on decedent's car were not burning after the accident, although there is evidence that the ignition was on.

Plaintiff relies on the recent case of Pennington v. McLean, 16 Ill. 2d 577 (1959). There a verdict was directed

for plaintiff by the trial court, but judgment was reversed by the Appellate Court (18 Ill. App. 2d 316) on the ground that plaintiff's intestate was contributorily negligent as a matter of law. The case was then appealed to the Supreme Court, which held that reasonable men could differ as to whether plaintiff's intestate had exercised due care, and that accordingly it was error for the Appellate Court to set aside the jury verdict for plaintiff. The judgment of the Appellate Court was reversed, and the cause remanded, with directions to consider any other alleged errors in the record. The evidence in the Pennington case showed that plaintiff's intestate, in south-bound traffic, was proceeding slowly through a busy intersection. Defendant, traveling east at fifty-five miles an hour, was unable to swerve within 150 feet, from which distance, so he testified (as an adverse witness), he first saw decedent's truck. Defendant hit the right rear corner of the truck, which then spun around and tipped over; after the accident, defendant's car slid to a stop some twenty-five to thirty feet beyond the truck. Defendant testified both as an adverse witness and in his own behalf, and gave contradictory versions of the accident. It was dark at the time of the occurrence, but there was doubt as to whether defendant's lights were on, and he admitted that he gave no horn signal. There was in addition testimony by a disinterested witness. Thus the Pennington case does not, as plaintiff seems to think, present a factual situation almost identical to the instant proceeding. Here defendant, with his lights on, was

traveling at a reasonable rate of speed. There is no testimony of eyewitnesses to the occurrence, but what evidence there is indicates decedent had a clear view of the road and did not sound a horn nor attempt to stop. The testimony further casts doubt as to whether decedent's lights were on.

The mere happening of an accident does not of itself raise any presumption of negligence on the part of either plaintiff or defendant. It is incumbent on plaintiff to prove negligence on the part of defendant, and also to establish due care on the part of plaintiff or, as here, plaintiff's intestate. *Brown v. Boyles*, 27 Ill. App. 2d 114, 124 (1960); *Keller v. Menconi*, 7 Ill. App. 2d 250, 255 (1955); *Louis v. Checker Taxi Co.*, 318 Ill. App. 71, 74 (1943). We think the court properly took the case from the jury and entered judgment on the directed verdict. The judgment is affirmed.

Judgment affirmed.

BURKE, P.J., and
BRYANT, J. Concur

2nd DIVISION

Abstract

No. 11456

Publish Abstract Only

Agenda 5

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT., SECOND DIVISION
FEBRUARY TERM, A.D. 1961

FILED

APR 28 1961

PAUL V. WUNDER
Clark Appellate Court Second District

ROGER G. BELT,

Plaintiff-Appellee,

vs.

JESSIE BELT,

Defendant-Appellant.

130 I.A. 23
Appeal from the
Circuit Court of
Grundy County, Illinois.

WRIGHT -- J.

The plaintiff, Roger G. Belt, filed a complaint for divorce in the Circuit Court of Grundy County, Illinois, against the defendant, Jessie Belt, alleging desertion upon her part. The defendant, Jessie Belt, answered denying the material allegations of the complaint and filed a counter-claim praying for separate maintenance, support during the pendency of the suit and for her attorney fees. Her counter-claim for separate maintenance was based upon the plaintiff's alleged desertion without cause or fault on her part. A trial was had without a jury and the court entered a decree

505 DIVISION

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The following is a copy of the report of the
Commissioner of the State of New York, dated
the 1st day of January, 1900, and filed in the
Office of the Attorney General, on the 1st day of
January, 1900. The report is in the form of a
letter addressed to the Attorney General, and is
dated the 1st day of January, 1900. The report
contains a statement of the facts and circumstances
connected with the case of the State of New York
against the State of New York, and a statement
of the results of the investigation conducted by
the Commission. The report is in the form of a
letter addressed to the Attorney General, and is
dated the 1st day of January, 1900. The report
contains a statement of the facts and circumstances
connected with the case of the State of New York
against the State of New York, and a statement
of the results of the investigation conducted by
the Commission.

granting plaintiff a divorce on the ground of desertion and ordering that defendant take nothing by her counter-claim for separate maintenance. From this decree, defendant appeals.

Plaintiff and defendant were married on October 26, 1929. They lived and cohabited together until on or about August 15, 1955, when the plaintiff left the home after he, the defendant, and their son, Donald, engaged in an argument and plaintiff and defendant have been living separate and apart since that date.

Defendant contends that the evidence is not sufficient to support the finding of the trial court that the defendant deserted and absented herself from the plaintiff against his will and without any reasonable cause, and further argues that on the contrary the evidence shows that the plaintiff deserted the defendant and left the home without reasonable cause or fault on her part.

Plaintiff contends that although he left the marital abode, he did so because the defendant continually nagged him and was quarrelsome; refused to engage in sexual intercourse with him for a period of some two years prior to the date of his leaving and is, therefore, guilty of constructive desertion entitling plaintiff to a divorce.

The evidence concerning the alleged constructive desertion by the defendant and the alleged desertion by

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

2. The second is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

3. The third is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

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9. The ninth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

10. The tenth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

plaintiff relates to an argument which occurred on August 15, 1955, being the date the plaintiff left the home of the parties. Plaintiff testified that on the date of their separation he and his wife had a "pretty good argument" but he didn't know how or what it started over. Plaintiff related that every time he walked into the house the defendant, "was on my back for something." He then added, "it started out, I went inside, finally she asked me why in the hell I didn't get out of there, and I said, 'Well, I am going,' and I left." Plaintiff further testified that this was the climax of their argument that day; that he left voluntarily and never has been back inside their house since; that his wife has never invited him to come back and never indicated in any other manner that she wished to resume the marital relationship with him. Plaintiff also testified that for two years prior to August 15, 1955, that the defendant did not properly prepare his meals, take care of laundry and do other chores in and about the home.

The defendant testified that on the date of the argument of August 15, 1955, that their son, Donald, was home on leave from the Navy. She related that the plaintiff came home that evening and he asked me, "where Mr. Belt was," and I said, "There you are," and he said, "I mean Mr. Donald Belt." The defendant then said, "I don't know where Don

is." The plaintiff then said, "Well, I do, he's down at the tavern." She further stated that the plaintiff began arguing with her but that she did not know what it was all about. She testified that she then left and went to the tavern and called their son, Donald, outside and talked with him. She asked the son if he had trouble with his father and he said, "no." The defendant then told her son that she did not know what was wrong with his father that he was upset and that he had better come home. The defendant stated that when Donald came home the plaintiff and Donald began arguing quite strenuously and the argument almost progressed into a fight. Donald then said, "There's no sense in having all of this trouble, I'll pack my clothes, Mother, and I'll go back." The defendant then asked their son not to do that and the plaintiff said, "No, you don't have to do that, because I'm leaving." The defendant then testified that the plaintiff left the home and later called her that night when he had been drinking and said, "I've been trying to get rid of you for twenty-five years." Donald Belt was not called as a witness and did not testify on behalf of either plaintiff or defendant.

Michael Belt, also a son of the parties, testified that he was home on August 15, 1955, and at the time the argument started between the plaintiff and the defendant he was next

door and heard a lot of noise going on at his house. He testified that the plaintiff was boisterous, talking loud and that people all around could hear him. He also testified that later his brother, Donald, came in and that they really started arguing. He further stated that he was positive that his father had been drinking by the way he talked, the language he used and his manner. Michael did not testify as to any conversation between the plaintiff and defendant and did not in any way by his testimony corroborate either the testimony of the plaintiff or the defendant on the question of why the plaintiff left the home.

A reasonable cause which justifies a husband or wife to desert or abandon the other must be such as would entitle the person guilty of abandoning the other to a divorce. *Holmstedt v. Holmstedt*, 383 Ill. 290, 49 N. E. 2d 25. Accordingly, in order to justify a husband or wife in deserting the other because of misconduct or cruelty, the misconduct or acts of cruelty must be of such a character that they would support a divorce in favor of the innocent spouse, *Webber v. Webber*, 349 Ill. App. 154, 110 N. E. 2d 95, and continuous nagging, quarrelsomeness and disagreeableness, which amount merely to an interference with or disturbance of the peace and quiet of the husband does not justify desertion of the wife. *Swan v. Swan*, 331 Ill. App. 295, 73 N. E. 2d 153,

Godfrey v. Godfrey, 284 Ill. App. 297, 1 N. E. 2d 777.

In Holmstedt v. Holmstedt, supra., our Supreme Court reversing a decree of the trial court awarding the husband a divorce on the ground of desertion stated in the opinion at page 298 of 383 Ill. and page 30 of 49 N. E. 2d:

"The court erred in granting a divorce to appellee on the ground of desertion. Desertion justifying a divorce must be wilful and without any reasonable cause. Floberg v. Floberg, 358 Ill. 626, 193 N. E. 456. It has been held that a reasonable cause which justifies a husband or a wife to desert or abandon the other must be such as would entitle the party guilty of abandoning the other to a divorce. Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058."

Continuous argument, nagging and disagreeableness do not justify the husband in abandoning the home and obtaining a divorce on the ground of desertion. The courts in this state derive their powers to decree a divorce only by the statutes and the causes for divorce enacted by the legislature. Assume the defendant did argue with and nag the plaintiff and was disagreeable and quarrelsome and that on the occurrence in question during the heated argument might have asked the plaintiff why he did not get out, there is nothing in the statute granting the courts power to grant a divorce on these grounds, Swan v. Swan, supra.

Plaintiff further testified that for a two year period prior to their separation the defendant refused to have

On the subject of the "Mormon" question, the following is a copy of a letter from the Secretary of the Board of Education, dated March 10, 1890, to the Honorable Commissioner of Education, New York City.

sexual intercourse with him. This accusation was denied by the defendant. The denial of sexual intercourse is not one of the causes for divorce designated by the legislature and enumerated in the statute. Desertion which will justify a divorce must be without reasonable cause. A reasonable cause which justifies a spouse's desertion and abandonment must be such as will entitle the spouse to a divorce. *Fritz v. Fritz*, 138 Ill. 436. Assuming that the defendant refused to have sexual intercourse with the plaintiff as contended by him, this not being a ground for divorce would not justify the desertion and abandonment by the plaintiff and does not entitle the plaintiff to a divorce under the theory of constructive desertion. *Fritz v. Fritz*, *supra.*, *Moyer v. Moyer*, 17 Ill. App. 2d 404, 150 N. E. 2d 394.

We conclude that the evidence in this case is not sufficient to support a decree for divorce in favor of the plaintiff on the ground of constructive desertion.

We next consider whether or not the trial court erred in denying defendant's counter-claim for separate maintenance based upon plaintiff's alleged desertion. The right of a wife to sue in equity for separate maintenance is restricted to cases where the living separate and apart is without fault on her part. *Levy v. Levy*, 388 Ill. 179, 57 N. E. 2d 366. To be entitled to such relief, she must not only show that

The first of these is the fact that the system is not a simple one. It is a complex system, and the complexity is not only in the number of components, but also in the way they are interconnected. The second is the fact that the system is not a static one. It is a dynamic system, and the dynamics are not only in the way the components interact, but also in the way the system evolves over time. The third is the fact that the system is not a linear one. It is a non-linear system, and the non-linearity is not only in the way the components interact, but also in the way the system evolves over time. The fourth is the fact that the system is not a deterministic one. It is a stochastic system, and the stochasticity is not only in the way the components interact, but also in the way the system evolves over time. The fifth is the fact that the system is not a simple one. It is a complex system, and the complexity is not only in the number of components, but also in the way they are interconnected. The sixth is the fact that the system is not a static one. It is a dynamic system, and the dynamics are not only in the way the components interact, but also in the way the system evolves over time. The seventh is the fact that the system is not a linear one. It is a non-linear system, and the non-linearity is not only in the way the components interact, but also in the way the system evolves over time. The eighth is the fact that the system is not a deterministic one. It is a stochastic system, and the stochasticity is not only in the way the components interact, but also in the way the system evolves over time.

she has good cause for living separate and apart from her husband but also that she was innocent or blameless in the matter. If she is guilty of a failure of duty or misconduct materially contributing to the desertion of the marital relation, she is not without fault. *Bielby v. Bielby*, 333 Ill. 478, 165 N. E. 231. A husband is not guilty of abandoning his wife so as to authorize an award for separate maintenance if his departure was caused by the wife, and her misconduct need not be so serious as to be grounds for divorce in order to justify a separation. *Josephs v. Josephs*, 329 Ill. App. 340, 50 N. E. 2d 860.

While the evidence before us does not establish misconduct on the part of the defendant that gives rise to grounds for divorce, we believe that the evidence discloses misconduct on the part of the defendant which materially contributed to the destruction of the marital relation between the plaintiff and the defendant.

For the reasons herein stated, the portion of the decree of the Circuit Court of Grundy County, Illinois, granting plaintiff a divorce is reversed and the decree is affirmed in all other respects.

Reversed in part and affirmed in part.

Spencer J. Conners.
Crow. P.J. Conners

1. The first step in the process of identifying a problem is to recognize that a problem exists. This is often done by comparing current performance with a desired state or goal. If there is a significant difference, a problem is identified.

James
J. J.

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ERROR TO MUNICIPAL

COURT OF CHICAGO.

30 L.A. ^{2d} 270

Plaintiff in Error.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant, Alaska Fain, was charged in an information with carrying "...unlawfully on or about his person to wit a .38 Cal. Revolver, contrary to the form of the Statute...." He was found guilty in a nonjury trial and was fined \$100.00.

The defendant was tried and convicted under section 4 of the Deadly Weapons Act, which is as follows: "No person shall carry concealed on or about his person a pistol, revolver or other firearm." Ill. Rev. Stat., ch. 38, para. 155 (1959). The defendant's contention is that the information, by failing to allege that the revolver was concealed on his person, does not charge a crime and is fatally defective.

The contention is well founded. An indictment for a statutory offense must be framed on the statute. The offense must be charged either in the language of the statute itself or facts must be specifically alleged which constitute the statutory offense. People v. Sheldon, 322 Ill. 70, 152 N. E. 567; Johnson v. People, 113 Ill. 99.

The information in this case does neither. The word "concealed," which is omitted, is essential to a statutory description of the crime of carrying a concealed weapon on or about one's person. The word "unlawfully" is but a conclusion and cannot be substituted for the word "concealed." People v. O'Brien, 251 Ill. App. 314. If the exact language of the statute is not used the assertion that an act is done "unlawfully" cannot be considered as a descriptive allegation of specific facts which would constitute the offense of carrying a concealed weapon. Possessing and carrying a revolver is not a crime, and the word "unlawfully" does not of itself transform a legal act into an illegal one. Concealment is the gist of the offense and an information which does not charge concealment by word or by facts does not charge the crime. People v. McClendon, 23 Ill. App. 2d 10, 161 N.E.2d 584; People v. Beason, 342 Ill. App. 621, 97 N.E.2d 603.

An information charging a crime is necessary to a conviction for that crime. A finding of guilty does not establish guilt if the information charges no criminal offense. People v. Minto, 318 Ill. 293, 149 N.E. 241. A judgment based on a defective information is void and a void judgment may be attacked in a court of review. People v. Sowrd, 370 Ill. 140, 18 N.E.2d 176; People v. Green, 368 Ill. 242, 13 N.E.2d 278; People v. Williams, 4 Ill. App. 2d 506, 124 N.E.2d 537. In the Green case it was

said:

"...if an indictment is void the error may be reached in this court even though there has been a plea of guilty in the trial court. (Klawanski v. People, 218 Ill. 481.)"

The People urge that, if the information is held to be defective, we should remand with directions to permit amendment. The cases cited by the People in support of this request are not in point. In all of them amendments were permitted in the trial court prior to judgment. We know of no case which holds that an information can be amended after judgment or on appeal. In People v. Green, supra, it was said, in reference to a void judgment, "...on review, the proper order is one of reversal without remanding."

The judgment of the Municipal Court will be reversed.

Reversed.

Schwartz, P.J., and McCormick, J., concur.

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at
Springfield, on the FIRST TUESDAY in MAY A. D. 19 61

PRESENT

30 I.A. 271^{2d}

HONORABLE WILLIAM M. CARROLL, Presiding Justice

HONORABLE C. ROSS REYNOLDS, Justice

HONORABLE BURTON A. ROETH, Justice

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 16th day of
MAY, A. D. 19 61, there was filed in the office of the said Clerk of said Court,
an opinion of said Court, in words and figures following:

FILED

MAY 16 1961

Robert L. Conn, CLERK
APPELLATE COURT 3rd DIST.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10329

Agenda No. 5

Winona Frame,

Plaintiff-Appellee,

vs.

Rowena Grecivich,

Defendant-Appellant.

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Appeal from the
Circuit Court of
Macoupin County

Rowena Crorkin,

Plaintiff-Appellee,

vs.

Rowena Grecivich,

Defendant-Appellant.

CARROLL, Presiding Justice.

This action was brought to recover damages for personal injuries sustained by plaintiffs, Winona Frame and Rowena Crorkin, as the result of an automobile collision which occurred July 25, 1956 on Illinois Route 48, 3 miles south of Blue Mound in Macon County, Illinois.



Plaintiffs were guest passengers in an automobile being driven by the defendant, Rowena Grecivich. The jury returned a verdict for the plaintiff, Winona Frame, in the amount of \$125,000.00 and a verdict for plaintiff, Rowena Crorkin, in the amount of \$5,000.00. The defendant's post trial motion was overruled and judgment was entered on the verdicts. Thereafter, an appropriate motion was made by defendant for a credit of \$11,000.00, the amount paid to plaintiff, Winona Frame, in consideration of her having executed a covenant not to sue running in favor of her physician. An order was entered thereon and the judgment in favor of Winona Frame reduced to \$114,000.00. The defendant appeals from the judgment below.

The following points are urged as grounds for reversal:

1. That the trial court erred in failing to admit into evidence the complaint and other pleadings in a malpractice suit filed by plaintiff, Winona Frame, in which she alleged negligent treatment for the same injuries that are the subject of this suit.
2. That the trial court erred in failing to admit into evidence a covenant not to sue executed by plaintiff, Winona Frame, in settlement of the malpractice suit and in failing to instruct the jury thereon.
3. That the verdict is against the manifest weight of the evidence.

4. That the conduct and alleged immaterial testimony of plaintiff, Winona Frame, was highly inflammatory and prejudiced the defendant's case.

The complaint charges the defendant with wilfull and wanton misconduct, in that the defendant was alleged to have operated her automobile at a reckless and dangerous rate of speed; that she wilfully and recklessly operated the same with disregard for the safety of others; that she failed to keep her automobile under control; that she wilfully and wantonly disregarded a traffic regulation which regulates the passing of other vehicles proceeding in the same direction; and that the defendant wilfully and wantonly failed to keep a proper lookout for other vehicles. The defendant joined issue on these allegations.

On the date of the accident, plaintiff, Winona Frame, and her mother, Rowena Crorkin, were guest passengers of the defendant, Rowena Grecivich. The defendant is the sister of Winona Frame and a daughter of Rowena Crorkin. Also in the automobile were two sons of Winona Frame. This family group had journeyed to Decatur, Illinois from Benld, Illinois, to visit a relative. On the return trip from Decatur, the plaintiff, Rowena Crorkin, was seated in the front seat next to the defendant and the plaintiff, Winona Frame, was seated in the rear seat between her two sons. The defendant drove south from Decatur on Illinois

State Route 48 to the scene of the occurrence. Route 48 is a paved two-lane highway and in the vicinity of the accident scene is straight and level. The area is rural and there were no obstructions to vision.

The plaintiff, Winona Frame, testified that the defendant drove the car at approximately 80 miles an hour and was upset and angry and impatient to reach her home. She also testified that both she and her mother asked the defendant to drive more slowly but that such requests were ignored and that she remembered nothing about the collision itself. She sustained severe and permanent injuries, the residual of fractured cervical vertebrae. Although the trial commenced more than 3-1/2 years after the occurrence, she was still confined to a hospital bed and required constant nursing and medical care. During the course of cross-examination of this plaintiff, the defendant's counsel sought to explore previous claims made by such plaintiff to the effect that her injuries were aggravated by the negligence of her attending physician in diagnosing and treating her injuries. In such examination reference was made to defendant's Exhibit No. 1 which consisted of a complaint and other pleadings in connection with a malpractice suit commenced by plaintiff. While it does not appear that said exhibit was then offered in evidence, the record reflects an indication by the court that the exhibit would not be admitted on plaintiff's side of the case but that defendant would not be precluded

from making a showing at the proper time. Defendant's counsel was permitted to cross-examine this plaintiff at great length outside the presence of the jury in an apparent attempt to demonstrate to the court the propriety of exploring the subject on cross-examination. Eventually cross-examination before the jury was resumed and during the course, thereof, this plaintiff freely admitted that she had previously claimed that her injuries were not properly diagnosed and that she was negligently treated for such injuries by her physician. She also stated that she had previously claimed that her condition was aggravated by alleged improper diagnosis and treatment.

The attending physician testified for the plaintiff and related in detail his diagnosis and treatment. He also related his eventual discovery of the severe injury to cervical vertebrae which prompted his bringing an orthopedic surgeon into the case. He stated that he was never discharged by the plaintiff and that he had attended her until the time of her discharge from the hospital. He stated that he had no interest in the outcome of this law suit. The defendant then offered defendant's Exhibit No. 1, which the trial court refused to admit. The defendant urged that the exhibit ought to have been received at that time to show the doctor's alleged interest in the law suit and to impeach his credibility.

The orthopedic surgeon testified concerning his examinations and treatment and stated that it was his opinion that the attending physician's failure to immediately diagnose plaintiff's condition and to apply appropriate treatment promptly did not aggravate plaintiff's condition. While observing that sound medical practice would require timely reduction of a fracture, he stated that no aggravation did, in fact, occur.

Plaintiff, Rowena Cronkin, testified that prior to the occurrence she and plaintiff, Winona Frame, repeatedly told the defendant to slow down and drive more carefully but that the defendant continued at the high rate of speed of approximately 80 miles an hour. She testified that the defendant overtook a south bound automobile house trailer and that the next thing she knew the automobile crashed against the culvert near the east shoulder of the highway to the south of an intersecting secondary road. This plaintiff sustained back and chest injuries and complained of permanent partial disability.

The defendant, testifying as an adverse witness, stated that she had been driving 50 to 60 miles per hour. She gave the opinion that she was not traveling at the rate of 80 miles per hour but admitted that it was possible that she might have been driving that fast. She testified that while she did not remember her mother or sister cautioning her, such a fact was possible. She related that when she was about 25 feet behind the house

trailer she turned into the opposite or north bound lane of traffic in order to pass the trailer. At that time she noticed that there were two or three automobiles ahead of the trailer. She said that she did not notice the intersecting road at the time she turned out to overtake the trailer but estimated that she was about 450 feet to the north of the road at the time she turned out to pass. She stated that when she was 4 or 5 car lengths from the country road still traveling south in the north bound lane, one of the south bound automobiles ahead of her started to make a left turn into the secondary road. She applied her brakes, lost control of the automobile and crashed into a concrete culvert beyond the intersecting road to the south and near the east shoulder of the road. She said that there was no approaching traffic, that the road was straight and that the automobile which turned failed to give an appropriate signal. She did not state whether or not she sounded her horn or gave any other signal of her intention to pass. She admitted that she was in a hurry to reach her home.

The defendant called the plaintiff, Winona Frame, as an adverse witness and she again admitted having claimed on a prior occasion that her attending physician erroneously diagnosed her condition and failed to treat her promptly for the injuries sustained. The defendant, testifying in her own behalf, said that at the time she started to pass, the house trailer, she was approximately 400 feet from the intersecting secondary highway. She

related that as she was passing the house trailer, she noticed an automobile turning to the left into this road and that at that time she was only 1 or 2 car lengths behind the automobile. She did not state whether she sounded her horn or gave any other signal of her intention to pass. She stated that when the other automobile started to turn she applied her brakes and lost control of her car.

No further evidence was adduced by defendant which is material on this review. Defendant's Exhibit No. 1 was not offered during the presentation of her side of the case.

The first alleged error concerns the trial court's failure to admit defendant's Exhibit No. 1 into evidence. We find no merit in this point. The defendant failed to offer the exhibit during the presentation of her defense and there appears to have been no ruling by the trial court on an offer of proof. Accordingly, the matter has not been preserved for review and can be summarily disposed of on that ground. Not only does the abstract fail to reflect an offer and an adverse ruling, but it fails to include the exhibit or its contents. Central/^{Illinois}Public Service Company v. Deterding, 331 Ill. 277, 283; While failure to preserve the question for review is a compelling reason to dismiss the matter, in addition we fail to see how the defendant could have been prejudiced by the trial court's ruling. The plaintiff, Winona

Framo, admitted to having claimed on a previous occasion that her attending physician failed to promptly diagnose and treat her injuries. She made this admission on cross-examination, during her case in chief, and again when called as an adverse witness by the defendant. The orthopedic surgeon, however, testified that no aggravation did, in fact, occur but that plaintiff may have suffered some pain and inconvenience during the period of delay. We think, therefore, that the defendant did, in fact, obtain the benefit of cross-examining the plaintiff on this point and that the facts were fully disclosed and presented to the jury. To have admitted the malpractice pleading after two admissions by the plaintiff would have placed undue emphasis on this point. We, therefore, think the alleged error harmless even if properly preserved for review.

The defendant next complains that error was committed in not admitting the covenant not to sue in evidence. Again the abstract fails to reflect an offer of proof and the ruling thereon. Apparently, counsel for the defense relied on an indication by the court during the pre-trial conference that the covenant would not be admitted. However, the court did inform counsel at the conference that it would make its ruling at the proper time during the course of the trial and when the question was properly presented to it. A mere indication by a trial judge that certain evidence would not be admitted does not amount to an exclusion of such

evidence in the absence of an actual offer. There can be no refusal to admit that which is not offered. Chicago City Railway Company v. Carroll, 206 Ill. 318, 328. Altho the claimed error cannot be considered because of failure to preserve the same for review, we think it appropriate to observe that defendant's complaint is without merit. Following the entry of judgment on the verdict in the sum of \$125,000.00, defendant obtained a reduction of the judgment in the amount of the sum paid to plaintiff for a covenant. We think this was the proper method. DeLude v. Rimek, 351 Ill. App. 466, 474.

The defendant complains that the verdicts are against the manifest weight of the evidence. The defendant complains that plaintiffs did not testify to the occurrence itself and that all the testimony relating thereto came from the defendant testifying as an adverse witness. We think it may be assumed that the defendant testified most favorably to herself. Her testimony is consistent with plaintiff's theory of liability and it alone is sufficient to support the jury's verdict. It is urged that mere speed alone cannot constitute wilfull and wanton mis-conduct, nor can the application of brakes be so considered because defendant was confronted with a sudden emergency. This contention disregards other material facts and circumstances surrounding defendant's conduct. There was evidence that she had been traveling 80 miles an hour, that she was upset, angry and impatient, and ignored the warnings

of her guest passengers. The evidence was that she pulled out to pass a line of cars proceeding in the same direction and that at no time signaled her intention to pass. It seems that her own conduct created any emergency conditions which may have existed. The jury may well have believed that the turning automobile had no opportunity to observe defendant's car which was approaching from the rear at a high rate of speed in the north bound lane. We think the record demonstrates that a jury and trial court who had the opportunity of seeing and observing the witnesses could reasonably conclude that defendant was guilty of wilfull and wanton mis-conduct. Only where a conclusion opposite to that reached by the jury is clearly evident can a verdict be said to be against the manifest weight of the evidence. Such is not the situation in this case. The verdict should not be disturbed on that ground. Stone v. Guthrie, 14 Ill. App. 2nd, 137; Parrucci v. Kruse, 12 Ill. App. 2nd, 30, 40.

The defendant next urges as error the trial court's failure to declare a mis-trial because of plaintiff, Winona Frame's, conduct and inflammatory testimony. The abstract fails to disclose a motion by defendant in this regard or a ruling thereon by the trial court. The point, therefore, has not been preserved for review and cannot be considered by this court.

We find no reversible error in the record and, therefore, affirm the judgment of the circuit court.

AFFIRMED

REYNOLDS and ROETH, JJ., concur.

FILED MAY 25, 1961

No. 11462

Publish Abstract Only

Agenda 8

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, SECOND DIVISION
FEBRUARY TERM, A.D. 1961

A. P. FREUND SONS, et al.,

Plaintiffs-Appellants,

vs.

HAROLD H. VAUPELL, et al.,

Defendants-Appellees.

Appeal from the
Circuit Court of
McHenry County.

301A 271 2

WRIGHT -- J.

The plaintiffs, A. P. Freund Sons, Irvin Freund, a/k/a Irvin Freund and Ralph Freund, seek to enforce a lien against certain named defendants in the sum of \$191,014.60 upon 372 acres of land between Griswold Lake and Fox River in McHenry County, Illinois. The plaintiffs are contractors who claim to have excavated, dredged, filled and landscaped the original farmland into a subdivision of residential lots known as Holiday Hills. The improvements for which they claim to have been responsible include the road network and artificial and improved water channels and canals.

THE UNIVERSITY OF CHICAGO

OFFICE OF THE DEAN
1100 S. EAST ASIAN BLDG.
CHICAGO, ILL. 60607

Dear Mr. [Name]:

I am pleased to inform you that your application for admission to the M.A. program in East Asian Studies has been accepted. You will be joining a group of students who are pursuing their studies in this field. The program is designed to provide a comprehensive understanding of the languages, literatures, and cultures of the East Asian region. You will be required to complete a series of courses, including those in the core curriculum and those in your specific area of interest. The program is highly competitive, and your acceptance is a testament to your academic achievements.

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Yours sincerely,
[Signature]

Plaintiffs' original complaint was filed on August 25, 1958. On October 3, 1958, defendant, Holiday Hills, Inc., filed a motion to dismiss plaintiffs' complaint. On February 20, 1959, the trial court entered an order dismissing plaintiffs' complaint. From this order of dismissal, plaintiffs appealed to this court in the case of A. P. Freund Sons, Irwin Freund and Ralph Freund, Appellants, vs. Harold H. Vaupell, et al., Appellees, in case No. 11297. On June 22, 1959, in response to a motion of defendants, Holiday Hills, Inc. and Robert P. Rosenthal, this court, without opinion, dismissed the appeal of plaintiffs "on the grounds that no final appealable order had been rendered in any court of competent jurisdiction." On April 1, 1960, the trial court entered an order granting leave to plaintiffs to file their first amended complaint which was filed on that date. On April 29, 1960, Holiday Hills, Inc., and Robert P. Rosenthal, filed a motion to vacate the order of court granting leave to plaintiffs to file their first amended complaint on the ground that the court was without jurisdiction since there was no mandate of this court filed by plaintiffs in the trial court after the first appeal. Thereafter, on May 5, 1960, plaintiffs filed in the trial court the mandate of this court. The trial court on June 15, 1960, granted plaintiffs leave to refile their first amended complaint instantler as

plaintiffs' second amended complaint.

Defendants, Holiday Hills, Inc., and Robert P. Rosenthal, d/b/a Rosenthal Lumber and Fuel Co., filed a motion supported by an affidavit to dismiss plaintiffs' second amended complaint. This motion was joined in by defendants, Harold H. Vaupell, individually and as Executor of the Estate of Grace N. Glorney, deceased, Anita Vaupell and the First National Bank of Woodstock, as Trustee, under Trust 197. The motion was based primarily on two contentions: (1) That the claim or demand of the plaintiffs against the defendants was barred by affirmative matter avoiding the legal effect or defeating the claim or demand of the plaintiffs, and was filed pursuant to Sec. 48 (1) (1) of the Civil Practice Act, (Ill. Rev. Stat., 1959, Chap. 110, Par. 48) and (2) that the order of the trial court entered on February 20, 1959, dismissing plaintiffs' original complaint is res judicata.

On July 15, 1960, the trial court heard arguments on the motion to dismiss the second amended complaint and sustained the motion and entered an order dismissing the second amended complaint as to all defendants, and ordering that the plaintiffs take nothing by virtue of said cause and that defendants go hence without day. From this order, plaintiffs appeal.

The second amended complaint is quite voluminous. The

first count consists of eighty paragraphs and occupies forty-nine pages in the Abstract of Record. In this count plaintiffs seek a lien on the basis of the Mechanic's Lien Statute. The second count contains eighty-one paragraphs and in this count plaintiffs seek a lien as a result of a contract and the business dealings between the parties. It would unduly lengthen this opinion to recite the allegations of the amended complaint and would not aid in a determination of this cause.

Defendants-appellees contend that Exhibits A and B, attached to defendants' motion to dismiss the second amended complaint constitute Covenants Not To Sue and are a bar to the present action. Plaintiff-appellants argue that the trial court erred in construing Exhibits A and B attached to defendants' motion to dismiss as Covenants Not To Sue, and further contend if they are Covenants Not To Sue they could have no effect except as to defendant, Holiday Hills, Inc., and should not be construed as Covenants Not To Sue the other defendants.

The motion of the defendants stated that the plaintiffs, A. P. Freund Sons and Ralph Freund did on or about January 2, 1958, and Irwin Freund did on or about April 15, 1957, execute and enter into certain written agreements, attached to the motion as Exhibits A and B respectively, with Holiday Hills, Inc., agreeing to take no action nor to commence suit against Holiday Hills, Inc., as to such indebtedness alleged to be

owing plaintiffs in their second amended complaint.

Exhibit A, attached to the motion to dismiss the second amended complaint, consists of a printed letter, the underlined portions of which were type written or hand written insertions. Exhibit A states as follows:

"HOLIDAY HILLS, INC.
McHenry, Illinois
Phone McHenry 1934

March 6, 1957

A. P. Freund Sons and
Mr. Ralph Freund
Porter Street
Crystal Lake, Illinois

Gentlemen:

As you have been informed previously by Mr. Vernon J. Knox, although the assets of Holiday Hills, Inc. seem to exceed its liabilities it is necessary that the assets be converted into cash in order to pay creditors. In order to avoid bankruptcy or receivership proceedings, which are both costly and time consuming, Mr. Knox has turned over the direction of Holiday Hills, Inc., through the medium of an irrevocable proxy to vote all of the outstanding stock to Mr. Robert Rosenthal, who represents the largest unsecured creditor, to Mr. Ralph Freund, who represents the largest secured creditor and to Mr. E. M. Melahn, who represents both secured and unsecured creditors and also has been active in the building construction program at Holiday Hills, Inc.

Under this new management, it is proposed that an active sales and building program be instituted and steps have already been taken to procure an active and attractive building program through a contract entered

into with Riverview Home Builders. Riverview Home Builders is in the course of constructing three very attractive model homes and it is planned that two of them will be completely furnished in order to be more attractive to prospective buyers. It is planned that Riverview Home Builders will extend the present water system in the Holiday Hills, Inc., subdivision and will install a modern sewage disposal system. The availability of water and sewer for every lot should attract a great number of buyers and will also facilitate the procuring of financing for the construction and sale of homes. All of the expenses of the sewage system and the extension of the water system as well as advertising and sales expenses will be paid by Riverview Home Builders. Holiday Hills, Inc., will sell lots to Riverview Home Builders at a reduced price taking into consideration the development expenses of Riverview Home Builders. Consequently, Holiday Hills, Inc., will have no expenditures except for ordinary operating expenses and monies received by Holiday Hills, Inc., will be available for the payment of existing creditors.

Of course, it will take some time for this program to get into full operation and therefore, it is dependent upon the cooperation of the creditors of Holiday Hills, Inc., and their agreement to extend the time of payment on the indebtedness owing to them. It is proposed that all existing creditors including the land owners, Harold H. Vaupell and Grace Glorney, be paid pro rata as monies become available for the payment of debts. We believe that this program is in the best interest of all creditors and that ultimately all creditors will be paid in full.

According to our information, the balance due to you by Holiday Hills, Inc., as of this date is \$110,777.32 plus interest at 6% per annum since January 2, 1957.

We ask that you kindly sign the enclosed copy of this letter agreeing to these arrangements and return it to the office of Holiday Hills, Inc.

Very truly yours,

Holiday Hills, Inc.

/s/ Robert P. Rosenthal,
President

In consideration of the execution of a similar agreement by other creditors of Holiday Hills, Inc., the undersigned hereby agrees to the arrangements set forth above and further agrees to take no action nor to commence suit against Holiday Hills, Inc.; on the indebtedness owing to the undersigned as long as the proxy heretofore mentioned is in force. The undersigned further states that as of this date the balance due to the undersigned by Holiday Hills, Inc., is \$110,777.32 plus interest at 6% per annum since January 2, 1957.

A. P. Freund Sons and Ralph Freund
By: /s/ Ralph Freund

Dated: January 2, 1958."

Exhibit B, attached to the motion to dismiss the second amended complaint, was a printed form similar to Exhibit A, quoted above, with the exceptions that it is addressed to "Mr. Irwin Freund, Freund Avenue, McHenry, Illinois." The amount involved is inserted as "\$73,825.14" with no interest credited, the date of apparent signature by Mr. Irwin Freund is "April 15, 1957" and this form apparently bears the signature of "Irwin Freund."

The motion of the said defendants to dismiss plaintiffs' second amended complaint stated that agreements such as Exhibits A and B were executed and entered into for valuable consideration, to-wit, the execution of similar agreements by other creditors of Holiday Hills, Inc; that such agreements were and remain in full force and effect as to all times pertinent to the above entitled action. The affidavit in support of said motion stated that similar agreements as Exhibits A and B were entered into by other creditors of Holiday Hills, Inc. The affidavit, in support of the motion, recites the names and addresses of thirty-three other creditors of Holiday Hills, Inc., who executed similar agreements. The affidavit alleges further that the irrevocable proxy of Mr. Vernon J. Knox as mentioned in said creditors' agreements, turning over the direction of Holiday Hills, Inc., to Messrs. Robert P. Rosenthal, Ralph Freund and E. M. Melahn has been at all times and remains as to all times pertinent to the above entitled action, in full force and effect, a verified copy of which was attached to the affidavit.

A covenant is an agreement between parties to do or not to do a particular act. No particular form of words is necessary to constitute a covenant, but whatever shows the intent of the parties to bind themselves to the performance of a thing stipulated may be deemed a covenant, without regard

to the form of expression used. Whether or not a document is construed to be a Covenant Not To Sue depends upon the words used, the substance of the agreement and the intention of the parties. . Hulke v. International Manufacturing Co., 14 Ill. App. 2d 5, 142 N. E. 2d 717. The authorities are well in accord that while a covenant is technically not a release, nevertheless; to avoid circuitry of action it may be pleaded in bar of the cause of action to which it relates. 45 Am. Jur., Release, Sec. 3.

The last paragraph of Exhibits A and B, which are alleged to be Covenants Not To Sue, stated that "in consideration" of the execution of similar agreements by other creditors, the plaintiffs agreed to the proposed arrangements set forth in the first part of the exhibits and they further agreed, "to take no action nor to commence suit against Holiday Hills, Inc., on the indebtedness," as long "as the proxy hereto mentioned is in force." The consideration stated was, in fact, supplied in that thirty-three other creditors executed similar agreements not to sue. Exhibits A and B stated that the plaintiffs would not sue "as long as the proxy mentioned therein was in force." The record reveals that the irrevocable proxy mentioned in said creditors' agreements, turning over the direction of Holiday Hills, Inc. to Messrs. Robert P. Rosenthal, Ralph Freund and E. M. Melahn, had been

at all times mentioned in the complaint of plaintiffs in full force and effect.

In Paragraph 60 of the second amended complaint, plaintiff, Ralph Freund, admits that Holiday Hills, Inc., deposited to his bank account in the First National Bank of Woodstock, Illinois, on August 10, 1959, the sum of \$5,804.21 and that he received notice thereof. He further states that a deposit was made to his account by said defendant in said bank in the sum of \$600.00 on February 13, 1959.

In Paragraph 62, he alleges that in addition to the \$5,804.21 deposited on August 10, 1959, that defendant, Holiday Hills, Inc., prior to January 23, 1960, had deposited \$1,095.04 to his bank account without notice to plaintiffs.

In Paragraph 63, plaintiff, Irwin Freund, alleges that on January 23, 1960, defendant, Holiday Hills, Inc., paid the sum of \$6,966.20 to him.

In Paragraph 64, plaintiff, Ralph Freund, alleges that on January 23, 1960, defendant Holiday Hills, Inc., paid him the sum of \$3,913.08:

Both Ralph Freund and Irwin Freund, allege that these payments so received by them from Holiday Hills, Inc., were applied to the reduction of accrued interest outstanding. Regardless of how these sums were paid and notwithstanding they were applied to interest and not principal, it reveals

and indicates a general intent on the part of the plaintiffs to participate in and ratify the agreements identified as Exhibits A and B.

In order to construe and determine whether or not Exhibits A and B are in fact Covenants Not To Sue, we must examine the words used, the substance of the agreement and ascertain the intention of the parties. It is quite obvious from a study of the record before us that the operation of Holiday Hills, Inc., became financially unsound and there was a general agreement between creditors, including the plaintiffs, in an attempt to avoid a bankruptcy or receivership proceeding that they would all refrain from suits or actions against Holiday Hills, Inc. Plaintiffs not only executed such agreements but the plaintiff, Ralph Freund, in fact, actively participated as a director under the irrevocable proxy in an attempt that creditors would be paid.

We conclude from the words used, the substance of the agreement and the obvious intentions of plaintiffs and defendant, Holiday Hills, Inc., that Exhibits A and B were intended to be and are, in fact, Covenants Not To Sue the defendant, Holiday Hills, Inc. These Covenants Not To Sue executed by the plaintiffs are a bar to plaintiffs' action against the defendant, Holiday Hills, Inc., however, these Covenants Not To Sue do not bar plaintiffs' action against

the remaining defendants.

It is next contended in defendants' motion to dismiss the second amended complaint that the order of the trial court entered on February 20, 1959, dismissing plaintiffs' original complaint is res judicata and bars any further action on plaintiffs' second amended complaint. The doctrine of res judicata applies only in the case of final judgment. *Wadsworth v. Connell*, 104 Ill. 369.

When a former adjudication is relied upon as an absolute bar to a subsequent action, the only questions to be determined are whether the cause of action is the same in both proceedings, whether the two actions are between the same parties or their privies, whether the former adjudication was a final judgment upon the merits, and whether it was within the jurisdiction of the court rendering it. *People v. Kidd*, 398 Ill. 405, 75 N. E. 2d 851. The order of the trial court entered in this cause on February 20, 1959, was held by this court not to be a final appealable order and consequently the doctrine of res judicata has no application in this case.

We, therefore, conclude that the trial court properly dismissed the plaintiffs' second amended complaint as to the defendant, Holiday Hills, Inc., but the court erred in dismissing the complaint as to all of the remaining defendants.

A motion was filed herein by the appellees to dismiss

this appeal and the appellants filed a motion to strike the brief of appellees. These motions were taken with the case and are overruled.

The order of the Circuit Court of McHenry County is affirmed as to the defendant, Holiday Hills, Inc., and is reversed as to all other defendants.

ORDER AFFIRMED IN PART, AND REVERSED IN PART.

SPIVEY, P. J. and CROW, J., Concur.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1961

JAMES W. WITHERSPOON, J. C.
EVANS and J. H. SEARS,
Plaintiffs-Appellants,
vs.

GLENN S. GILMORE and MARY ELSIE
GILMORE,
Defendants-Appellees.

2d 72
Appeal from the
Circuit Court of
Mercer County, Illinois.

CROW, P. J.

The plaintiffs-appellants, James W. Witherspoon, J. C. Evans, and J. H. Sears, brought suit against the defendants-appellees, Glenn S. Gilmore and Mary Elsie Gilmore, on a note which reads as follows:

"12,500.00 Aledo, Illinois October 6, A.D. 1952.

One Year after date, without grace, I, we, or either of us promise to pay to the order of James W. Witherspoon

TWELVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS, with 6 per cent interest thereon from date, interest payable at maturity annually. All past due principal and interest shall bear interest at the rate of per cent per annum until paid. If this note is not paid when due, and is placed in the hands of an attorney for collection, or if collected through Probate or Bankruptcy proceedings, then ten per cent of the amount then due hereon shall be added as attorney's fees. We the makers, guarantors, assignors, sureties and endorsers severally waive extension, presentment for payment, demand, protest, notice of protest, and diligence in bringing suit against any parties hereto, for non-payment of this note.

Payable at the office of James W. Witherspoon, at Hereford, Deaf Smith County, Texas.

(s) Glenn S. Gilmore
(s) Mary Elsie Gilmore"

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4. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthaler and Whistler (1973).

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The plaintiffs averred that they are holders in due course; that one John Harper before maturity transferred, negotiated, and delivered the note to them; and that no part of the principal or interest has been paid. The defendants' answer admitted the execution and delivery of the note to one John Harper, but averred that no money or anything of value was given by the plaintiffs or received by the defendants for the giving of the note and that it is without consideration. It is further alleged in the answer that they entered into an agreement in writing with John Harper with respect to a certain mining venture and that the note was executed and delivered in pursuance of that agreement; that John Harper was an agent of, partner of, or associated with the plaintiffs in the mining project set forth in that agreement; that the mine was not put into production and the mill was not constructed; that the representations made by John Harper, on behalf of himself and the plaintiffs, or some one or more of them, as referred to in that agreement, were false, fraudulent, and without foundation; that the note was executed and delivered pursuant to those false and fraudulent representations; and that by reason thereof the note was without consideration. The plaintiffs filed a reply denying some of the affirmative new matters in the answer, including denying that any false representations were made to the defendants by John Harper upon which the defendants relied and which induced the defendants to execute and deliver the note sued upon, and further denying that the note was delivered pursuant to any false or fraudulent representations. There was a trial before a jury. The jury rendered a verdict for the defendants, a judgment was entered thereon for the defendants, the plaintiffs' post trial motion was denied, and the plaintiffs appeal. The defendants' motions for directed

The following is a summary of the information received from the various sources mentioned above:

1. The first source, who is a well-known authority on the subject, has stated that the information is reliable.

2. The second source, who is also a well-known authority, has stated that the information is reliable.

3. The third source, who is a well-known authority, has stated that the information is reliable.

4. The fourth source, who is a well-known authority, has stated that the information is reliable.

5. The fifth source, who is a well-known authority, has stated that the information is reliable.

verdict at the close of the plaintiffs' evidence and at the close of all the evidence, and the plaintiffs' similar motion at the close of all the evidence had been denied.

The plaintiffs urge there was error in the overruling of their post trial motion, that the verdict is against the manifest weight of the evidence, that the court erred in not directing a verdict for the plaintiffs, and in refusing and giving certain instructions. It is the theory of the plaintiffs that they are bona fide holders in due course of the note and it is hence free from the alleged defenses of want or failure of consideration, and, alternatively, that there was no competent evidence of a want of or failure of consideration. It is the defendants' theory that whether the plaintiff Witherspoon was a holder in due course and whether there was a failure of consideration were questions of fact properly resolved by the verdict, the verdict is warranted by the evidence, and the post trial motion was properly denied.

James W. Witherspoon, one of the plaintiffs and the named payee of the note, says that he advanced \$5000.00 of his own money to John Harper on the note, and also an additional \$1500.00 of joint money of his and J. H. Sears, and also charged the note with a \$2500.00 loan which Sears and Evans had made to Harper prior to the execution of the note (which loan had been cancelled and was to be paid out of the defendants' note), and it is said that the plaintiffs J. C. Evans and J. H. Sears, by reason thereof, have beneficial interests in the note and for those reasons are made parties plaintiff.

James W. Witherspoon is a lawyer in Hereford, Texas. He had been a District Judge in the past in Texas, and was at the time of

the execution of the note practicing law in Hereford. J. H. Sears was in the grain and banking business in Hereford. J. G. Evans was in the farming business near Hereford. The defendants, Glenn S. Gilmore and Mary Elsie Gilmore, were farmers, living seven or eight miles south of Aledo, Illinois.

It appears that the defendants had been acquainted with John Harper of Ensenada, Mexico, for about two years prior to October, 1952, and they had had during that period of time various business ventures with him, having paid or advanced him some \$100,000.00 for various business purposes.

This John Harper on October 11, 1952, after a preliminary discussion for a day or two, entered into a written agreement with the plaintiffs J. H. Sears, J. A. McWhorter, J. G. Evans, and James W. Witherspoon, by which Harper sold and transferred to them an undivided 1/2 interest in the so-called Quica Mine in the El Topo mining district of Lower California in the Republic of Mexico, the mine being a tungsten mining claim concession and property, with gold and allied ores in connection therewith. The consideration for the sale by Harper of this 1/2 interest therein to Sears, McWhorter, Evans, and Witherspoon was \$15,000.00, which they paid, and the further agreement of the purchasers to advance another \$35,000.00 for the building of a tungsten mill thereon for the processing of the ore. The plaintiff James W. Witherspoon drew up and dictated this agreement of October 11, 1952. Prior to that, on or about October 2nd or 3rd, 1952, the plaintiffs had paid, or advanced, \$1000.00 to Harper, with whom at that time they were discussing this mine.

It appears that John Harper had gone to Galesburg, Illinois to see the defendants, with whom he was previously acquainted, on

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or about October 4th or 5th, 1952, and had discussed with the defendants this same Quica tungsten mine in Mexico. He wanted them to invest \$25,000.00 and presented to them a proposed contract which was the same as the contract later entered into October 15, 1952 except for certain deletions later made. They did not reach any agreement at that time, and Harper went back to Texas, saw Witherspoon, entered into the agreement referred to of October 11, 1952 with Sears, McWhorter, Evans, and Witherspoon, and returned then to Galesburg, Illinois on October 15, 1952 and met again with the defendants.

As a result of this later meeting of October 15, 1952 the defendants on that day signed a contract with Harper and the note in question, made out to Witherspoon as the named payee, and payable at his office, which they testified was in consideration of the benefits set forth in the contract. It was understood that Harper was to try to sell, or discount the note to Witherspoon. At that time the defendants had never met Witherspoon or knew anything about him. Harper at that time had with him a signed copy of the contract which he had signed on October 11, 1952 transferring an undivided 1/2 interest in the Quica mine to Witherspoon and the three other plaintiffs, by which the plaintiffs had bought such and agreed to do certain things as to building a mill, and he showed it to the defendants as a part of the negotiations for their signing their contract with him of October 15, 1952 and the note. The contract of October 15, 1952 between Harper and the defendants recited that Harper had just consummated an agreement with a group of influential men from West Texas whereby they had agreed to build a mill

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to mill the ore coming from the Quica mine in the El Topo mining district and to advance substantial sums for operating capital. Part of the agreement between Harper and the defendants of October 15, 1952, recited as follows:

"Heretofore parties of the second part, Glenn and Elsie Gilmore, have advanced certain sums of money, also services, amounting to approximately \$100,000.00 to the said party of the first part, John Harper, and at this time John Harper is in need of an additional \$12,500.00 for the purpose of clearing the title on the Quica Mine, and to clear all personal obligations heretofore made by John Harper.

For and in consideration of the sum of \$12,500.00 paid to John Harper this date by parties of the second part receipt of which is hereby acknowledged. Party of the first part, John Harper, hereby agrees and authorizes the General Manager, Secretary, Treasurer and President of the Trust Company or Corporation that are to build the mill and operates said mine to pay to the order of the parties of the second part, Glenn Gilmore and Elsie Gilmore, a total sum of \$125,000.00."

The sum of \$125,000.00 was to be paid the defendants out of the earnings of the Quica mine. After this agreement was entered into between the defendants and Harper it was delivered, together with the promissory note, to Harper who then returned to Witherspoon's law office in Hereford, Texas, about October 18, 1952, where the note was turned over to or left with Witherspoon. Harper wanted to sell the note but Witherspoon could not cash it then.

It appears from the evidence that Harper had on October 6, 1952 actually dictated to Witherspoon's stenographer in Witherspoon's law office in Hereford the note that Harper had with him in Galesburg on October 15th for \$12,500.00, which, on that date, was signed by the defendants, and Harper had also at the same time dictated to her a letter on James W. Witherspoon's stationery, dated October 6, 1952, which was addressed to Mr. James W. Witherspoon, Box 387, Hereford, Texas, and which read:

It will be seen from the above that the total amount of the loan is \$1,000,000. The loan is to be repaid in 10 years, and the interest is to be paid semi-annually.

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"For a valuable consideration, receipt of which is hereby acknowledged, I have given Mr. John Harper our note due one year after date and dated October 6, 1952, due on October 6, 1953, for the sum of \$12,500.00. This will be your authority to cash this note for Mr. Harper or to discount it if you see fit and same will be taken care of on or before maturity.

Yours respectfully,

(s) Glenn S. Gilmore

Glenn Gilmore

(s) Mrs. Elsie Gilmore

Mrs. Elsie Gilmore"

Witherspoon says he had no knowledge of Harper's having so dictated the note and that letter to his stenographer. This letter so dictated by Harper, as written, was carried by Harper to Galesburg, and at the time of the signing of the defendant's contract of October 15, 1952 that letter was also signed by the defendants.

Witherspoon testified he did not draw the contract of October 15, 1952 between the defendants and Harper and that he never saw it until it was attached to the pleadings in the instant case. There does appear in evidence another letter dated October 16, 1952 addressed to Attorney James W. Witherspoon, Hereford, Texas, and signed by Glenn S. Gilmore, reading:

"As of yesterday I gave Mr. John Harper my note for \$12,500.00, payable to you, and in accordance with the contract he submitted to me.

Mr. Harper asked that I send you my financial statement. I am therefore enclosing copy of the last one I have prepared.

Should you wish to check same, contact the First National Bank of Moline, Moline, Illinois.

Trusting the mining venture proves out to the benefit of all.

Very truly yours,

(s) Glenn S. Gilmore"

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On October 20, 1952 Witherspoon wrote the defendants, a part of the contents of his letter being:

"I noticed in your letter that you mentioned that you have delivered the note to me through Mr. Harper in accordance with the contract he submitted to you. Please advise me if this is the contract which had been signed by myself and others with Mr. Harper pertaining to the purchase of an interest in the mine, or just what you refer to when you mention the contract he submitted to you."

On October 25, 1952 the defendants addressed a letter to Witherspoon at Hereford, a part of the contents thereof being:

"We received your letter of October 20th. You ask that we advise you regarding the contract submitted to us by Mr. Harper. We wish to say it was not the contract signed by you and your associates pertaining to purchase of an interest in his mine. He did, however, show us your contract, and it was on the strength of your contract that we made a new deal with him, which, briefly was as follows: -

'We, the Gilmores, having advanced some various amounts to him during the past two years, totalling near \$100,000.00 and he, being in need of \$12,500.00 for clearing up remaining obligations in connection with your deal with him, agreed that for a consideration of \$12,500.00 (the note you hold) we are to receive \$125,000.00 (of) out of 50% of his dividends from the Quica Mine. After this amount has been received by us, we are still to receive 20% of such dividends for the life of the mine also 10% of the net profits of the Hahn gold mine. It is understood that he may have to use more of his interest in the Quica Mine to further finance same later on.'

This will indicate to you our position and dealing with Mr. Harper on this matter, which facts we wish you to know. It was our understanding that you had drawn up our contract for Mr. Harper. If so, you will have the complete contents in mind."

In answer to that, Witherspoon wrote the defendants another letter, dated November 12, 1952, a part of which letter being:

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

"Concerning the properties of Mr. Harper, please be advised that I do not know a thing in the world about mining properties. In fact, I never saw one until a group here did look at this one mine and all of us are ignorant and do not know anything about mines or minerals at all. I am just a country lawyer who has worked hard at his law business all of his life and who expects to continue to do so, and anything that is made out of this mine will have to be done by someone else and the people on the ground because I do not have the time and could not have the time to take from my office and my practice to spend upon it."

It appears from the evidence and Witherspoon's testimony that he first met John Harper about a year prior to October 1952. At that time they had discussed some property in Mena, Arkansas, being a mine, and Witherspoon told Harper that he was not interested. He had met Harper two or three times in Hereford and Harper had some papers with him, and according to the testimony of Witherspoon's secretary, Harper was a client of Witherspoon's. The plaintiff Evans had known Harper since 1951. In September, 1952 the plaintiffs Sears and Evans had jointly loaned Harper \$2500.00 on a note and chattel mortgage. Witherspoon again met Harper on October 11, 1952 in Hereford. He discussed the Quica mine property in Lower California in Mexico with Harper and Witherspoon entered into the agreement of October 11, 1952 with Harper, together with Sears, Evans and McWhorter, in which Witherspoon and the other purchasers bought a 1/2 interest in the mining property. After the execution of the contract of October 11, 1952, Witherspoon didn't see Harper until October 17th or 18th and after then Harper spent considerable time trying to convince Witherspoon that the note of the defendants was a good note. Witherspoon admits he was present with Sears, Evans and McWhorter on October 31, 1952 and that the four of them and some other parties drove down to the mine in Mexico and there discussed with Harper whether it was feasible for Witherspoon and his associates to spend \$35,000.00 for a mill and concluded it was not.

He testified concerning a conversation with Harper at the time they were at the mine property in substance as follows:

"We told him that we would let him have \$3,000.00 by which he could dig this ore and have a hand operation but that we wanted a definite release from putting up a \$35,000.00 mill. That was the agreement. Each of us wrote our checks. The agreement to release us from the \$35,000.00 for paying for the mill was not in writing."

Witherspoon and the other plaintiffs paid Harper the \$3000 last mentioned at or about that time, October 31, 1952, and were, presumably, released from any further obligation to build a mill at the mine, though evidently there was no written release. Apparently it was not until a letter from Witherspoon to the defendants of January 12, 1953 that he particularly told them of that release of the plaintiffs from any obligation to build a mill at the mine under the plaintiffs' agreement of October 11, 1952 with Harper, although in a letter of November 26, 1952 from Witherspoon to the defendants he commented generally on some changes in the plaintiffs' agreement with Harper about building a mill. Evidently no mill was ever built at the mine to process the ore.

At some point the plaintiffs Sears and Evans cancelled their \$2500.00 note and chattel mortgage which they had against Harper in exchange for a \$2500.00 interest in this note of the defendants. Also, Sears and Witherspoon jointly advanced Harper \$1500.00 with the understanding that such would also come out of this note of the defendants. Witherspoon next heard from Harper about November 10 or 12, 1952 and advanced \$500.00 to him by wire on November 10th. On November 12th he again saw Harper in Amarillo, Texas and they had another discussion about the \$12,500.00 note of the defendants at which time Harper said he needed the money to get things going and to pay the bills and hire lawyers. At that time,

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...and you are ...

November 12th, Witherspoon told Harper that he would pay him \$4500.00 on the note, which he did. The understanding at that time (on Nov. 12) with Harper was that the note should be Witherspoon's from that time on and that Harper would have no further interest in the note. Prior to November 12, 1952, Witherspoon had written the defendants that he would like to have the money on the note before the maturity date; that he was badly in need of money; and he would appreciate it very much if they could pay it.

There may be a few additional facts in evidence, including some other correspondence, but the foregoing is the evidence chiefly relied upon by the parties. The defendants argue that the testimony clearly was such that the jury could draw reasonable inferences that Harper, apparently with the help or at least knowledge of the plaintiffs, was swindling the defendants in this transaction and that Harper's title to the note was defective; that Harper obtained the defendants' signatures on the note by misrepresenting that the plaintiffs were going to build a mill to process ore at the mine; that, notwithstanding that, approximately two weeks after the execution of the note Witherspoon and the other plaintiffs secured a release from Harper by paying him \$3,000.00, thus releasing all the plaintiffs from any further obligation to build any mill.

We cannot say, as a matter of law, that under the facts as so shown Witherspoon and the other plaintiffs were necessarily bona fide holders of the note in due course for value. If such cannot be said as a matter of law, then it became a question of fact for the jury, under proper instructions as to the law, if there was any competent evidence upon which the jury could determine as they did.

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The principal significant facts are these as we see it: the Gilmores, in consideration^{of} \$100,000.00 heretofore given or advanced Harper and the present \$12,500.00 note payable to Witherspoon, contracted with Harper in connection with the Quica mine, which contract recited that the Texas group (identified as Witherspoon, Evans and Sears) were to advance substantial sums in developing the Quica mine and were to build a mill to process the ore coming out of this Quica mine; that in consideration for this the Gilmores were to be paid the \$100,000.00 they had previously advanced Harper, plus \$12,500.00 representing the amount of the note, plus an additional \$12,500.00, - totalling \$125,000.00, - all out of the earnings of the Quica mine, which, of course, could produce no earnings of consequence until a mill to process the ore was built. It is not seriously denied that Harper was a client of Witherspoon's. He apparently had a close, familiar association with Witherspoon. He used the facilities of Witherspoon's office to further his business. We believe the jury could well draw the inference that Witherspoon at least knew of the conditions in the contract between Harper and the Gilmores in the first instance, or, if not in the first instance, that he at least became fully aware thereof soon thereafter and prior to his or the other plaintiffs' giving or advancing Harper any money or credit on or in connection with the defendants' note. The release by Harper for \$3,000.00 of the plaintiffs from their obligations under their contract of October 11, 1952 for the building of a mill was clearly a breach of faith and contract by Harper as to his contract of October 15, 1952 with the defendants, if such was not a fraud. The inference could be drawn from the testimony that Witherspoon and the other plaintiffs knowingly participated in causing this breach and knew that the defendants' \$12,500.00 note

had been given to Harper and their agreement of October 15, 1952 had been made on the strength of the plaintiffs' contract with Harper of October 11, 1952 and in consideration, inter alia, of the mill's actually being built so the mine could in fact operate and so the defendants could in fact be repaid out of the earnings thereof, if there were any. Any action by Witherspoon and the other plaintiffs from at least the time when he received the defendants' letter of October 25, 1952 on, if not before then, with respect to buying or advancing money or credit against this note, which they did not actually do until November 10th, approximately, could properly have been found to be not as a bona fide holder for value but as one standing in no different position than Harper and subject to any possible defenses to which the note would have been subject had it remained in Harper's hands. That the total amount the plaintiffs can be considered, under any circumstances, as having paid, or advanced, by money or credit, for this note was apparently \$9,000.00, or 72% of its face amount only, - that they discounted it 28% from its face, - is a factor of not inconsiderable importance as bearing on their bona fide status, vel non, to which the jury may properly have attached weight.

CH. 98, ILL. REV. STATS., 1951, pars. 10, 48, 72, 75, 77, 78,

and 79, provide:

"10. Failure of Consideration.) Sec. 9. In any action upon a note, bond, bill, or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, if such instrument was made or entered into without a good and valuable consideration, or, if the consideration upon which it was made or entered into has wholly or in part failed, it shall be lawful for the defendant to plead such want of consideration, or that the consideration has wholly or in part failed; and if it shall appear that such instrument was made or entered into without a good or valuable consider-

and then also to the other two (the other two are not mentioned in the text). The text is very blurry and the words are difficult to read. It appears to be a list of items or a description of a process. The text is oriented vertically on the page.

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ation, or that the consideration has wholly failed, the verdict shall be for the defendant; and if it shall appear that the consideration has failed in part, the plaintiff shall recover according to the equity of the case: Provided, that nothing in this section contained shall be construed to affect or impair the right of any bona fide assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due."

"48. Want of consideration - Effect.) Sec. 28. Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

"72. Who is a holder in due course.) Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

"75. When title is defective.) Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

"77. Holder in due course - Rights of.) Sec. 57. A holder in due course holds the instrument free from any defect of title or prior parties, and free from defenses available to prior parties among themselves except the defect and defense specified in Section 10 of act entitled "An Act to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing," approved March 18, 1874, in force July 1, 1874, and except the defect and defense specified in Sections 131 and 136 of an act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, in force July 1, 1874, known as sec-

tions 131 and 136 of Chapter 38 of the Revised Statutes of Illinois, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"78. When Instrument subject to original defenses.
Sec. 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

"79. Who is deemed holder in due course.) Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

There was a sufficient evidentiary and legal basis upon which the jury could find that there was an absence or failure of consideration, which was a matter of defense as against any person not a holder in due course, the same as if this negotiable instrument were non-negotiable. Although the plaintiffs are deemed prima facie to be holders in due course, there was a sufficient evidentiary and legal basis upon which the jury could find that it was shown that the title of Harper who had negotiated the instrument was defective because he obtained the instrument or the defendants' signatures there-to by fraud or had negotiated it in breach of faith, and hence the burden may properly have been determined to be on the plaintiffs to prove that they acquired the title as holders in due course. And there was a sufficient evidentiary and legal basis upon which the jury could find that the plaintiffs were not holders in due course

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because they did not take the instrument in good faith, and because at the time it was negotiated to them they had notice of infirmities in the instrument or defects in the title of the person (Harper) negotiating it.

In addition to the statutes referred to, there are a number of cases in this field that might be cited, but representative cases are: TAFT v. MYERSCOUGH (1902) 197 Ill. 600; SCHINTZ v. AMERICAN etc. BANK (1909) 152 Ill. App. 76; RENFROW v. KRAMER et al. (1930) 341 Ill. 398; INDUSTRIAL LOAN etc. CO. v. BELL (1939) 300 Ill. App. 502; BELL v. McDONALD (1923) 308 Ill. 329. And see: CONRADO et al. v. BINGHAM (1958) 17 Ill. App. (2) 537.

The verdict was not against the manifest weight of the evidence. The Court did not err in not directing a verdict for the plaintiffs.

The last contention of the plaintiffs is that the Court erred in refusing the plaintiffs' tendered Instruction No. 22, and in giving the defendants' Instructions Nos. 1, 2, and 3. We have considered those and believe there was no error in those respects, especially in view of other plaintiffs' instructions given.

The judgment will, accordingly, be affirmed.

Spivey, J. Concur.

AFFIRMED.

Spivey, J. and Wright, J. concur.

Copy, J. and Wright, T. 1904.

NO. 11508

Abstract

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION:
MAY TERM, A.D. 1961.

JOHN W. SCHAEFER and
MARY ANN SCHAEFER,

Plaintiffs-Appellees,

vs.

CLEARBROOK HOMES, INC.,
an Illinois corporation,

Defendant-Appellant.

Appeal from the
Circuit Court,
Lake County.

30 I.A.²⁴ 273

McNEAL, J. -

The plaintiffs, John W. and Mary Ann Schaefer, recovered judgment for \$297.00 on a verdict of a jury against the defendant, Clearbrook Homes, Inc. Defendant's post trial motion for judgment notwithstanding the verdict was denied, and defendant appealed.

In their amended complaint plaintiffs alleged that on July 20, 1956, defendant sold them Lot 22 and the north 6 feet of Lot 21, in Block 2, in Arthur Dunas' Mundelein Manor, a subdivision in Lake County; that prior to and at the time of the sale, defendant orally represented to them that the property was improved with storm sewers; that plaintiffs relied upon the representation, and in reliance thereon contracted to buy the property, paid the purchase price, and accepted conveyance of the real estate; that the representation was false; that on December 23, 1957, the Village of Mundelein adopted a special assessment ordinance for storm sewers; and that plaintiffs will be required to expend a large sum of money in order to comply with the ordinance. In its answer defendant admitted the sale of the property to plaintiffs, but denied all other allegations contained in the complaint.

Project Title

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The evidence disclosed that the Schaefer entered into a contract with the defendant corporation on October 13, 1955, and not on July 20, 1956, as alleged. By the contract defendant agreed to build a brick veneer house according to the Veterans Administration's Master Panel 1936 on the premises described, and upon completion to convey the premises to plaintiffs for \$16,950. The house was constructed and the property was conveyed to plaintiffs. They took possession in June, 1956.

Mr. Schaefer testified that in April, 1956, he went to defendant's office located in a model home near the premises and there met Mr. Freeman, then president of the company. As they stepped outside the office, Schaefer commented on the amount of mud in the area. Mr. Freeman said: "Don't worry, the storm sewers have been a little clogged up. This particular location was owned by Sam Insull years ago and he put sewers in here for a model community for the people of Chicago." According to plaintiff's testimony, this statement was made several months after plaintiffs had executed the contract to buy the property.

The only other witness at the trial was Mr. Turk, who was Freeman's successor as president of the company. Mr. Turk identified an exhibit captioned Subdivision Information which was defendant's request made in May, 1955, to the Veterans Administration for an analysis of the subdivision and for VA advice and suggestions. This exhibit represented to the Veterans Administration that there were no storm sewers in the subdivision. There was some evidence that this exhibit was present when the contract was signed and that it is incorporated in the contract by reference.

Plaintiffs-Appellees filed no brief in this court. On this state of the record we would be justified in reversing and remanding the cause without any further discussion. 2 I.L.P. 514, Appeal and

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Error par. 560; Eckells v. City Council of East St. Louis, 23 Ill. App. 2d 360, 362; Babinski v. Babinski, 20 Ill. App. 2d 336, 340. Nevertheless we have carefully examined the abstract and record in this case and find no other reference to storm sewers in the evidence. It is obvious that plaintiffs could not have been induced to make a contract in October, 1955, by means of any representation made in April, 1956, and that they could not have relied upon such representation at the time they made the contract.

Since there is no other evidence in the record to support the misrepresentation alleged, the verdict and judgment against defendant are against the manifest weight of the evidence. Accordingly the judgment of the Circuit Court of Lake County is reversed, and the cause is remanded with directions to enter judgment for defendant notwithstanding the verdict.

Reversed and remanded with directions.

SMITH, P.J., and DOVE, J., concur.

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only one of the most important but also one of the most difficult in the history of science. The author points out that the problem of the origin of life is not only a scientific problem but also a philosophical one. It is a problem that has been discussed by philosophers and scientists for centuries. The author then discusses the various theories of the origin of life, including the theory of spontaneous generation, the theory of biogenesis, and the theory of abiogenesis. He then discusses the evidence for each of these theories and the problems that each of them faces. Finally, he discusses the possibility of the origin of life on other planets.



281

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Abstract
A

General No. 10322

Agenda No. 2

Jess Cross, Jr.,

Plaintiff

vs.

Audrey Cross,

Defendant.

#

Audrey Cross (now Audrey Orr)

Petitioner--Appellant,

vs.

Jess Cross, Jr.,

Respondent--Appellee

CARROLL, Presiding Justice.

This appeal is from an order denying a petition for a modification of a divorce decree with respect to custody of a child of the litigants.

On February 26, 1955, respondent was awarded a decree of divorce from petitioner. The decree recited a stipulation regarding custody of Sheila, then age 3 and Paula, then age 5, and providing that custody of these children be given to the respondent.

30 I.A. 211

Appeal from the
City Court of
City of Mattoon

Abstract

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CIVIL DIVISION

People vs. [Name]

Case No. [Number]

Filed for [Date]

Plaintiff

301 A. 2

Defendant

Verdict

People vs. [Name]
State of California
County of Los Angeles

People vs. [Name]

People vs. [Name]

Verdict

People vs. [Name]

People vs. [Name]

People vs. [Name]

This report is given to you by the State of California
in accordance with the provisions of the law.
The State of California is a party to this case.

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The State of California is a party to this case.
The State of California is a party to this case.

On November 5, 1955, upon petition of respondent and again with stipulation of the litigants, a modifying order was entered which transferred custody of both children to respondent. On November 16, 1957, the parties stipulated that custody of the older daughter, Sheila, be transferred from respondent to petitioner. On August 17, 1959 the petition before us was filed, in which further modification was sought with respect to the custody of the younger child, Paula. The petition alleged a change in circumstances in that respondent had failed to properly care for the subject child. Respondent filed an answer denying the change in circumstances as alleged, and denying that the welfare of the child would best be served by effecting a change in custody. Upon the issue thus formed, a hearing was had, following which the Chancellor denied the petition.

The question before the Chancellor was whether sufficient change in circumstances had been shown to warrant further modification of the decree with respect to the custody of the subject child. This question was directed to the sound discretion of the court.

Ten witnesses testified at the hearing, 6 in behalf of petitioner. Both petitioner and respondent have remarried since the divorce decree was entered on February 26, 1955. The new spouse of each litigant has children by a former marriage. The respondent has had one child born to him since his last marriage. There was a conflict in the testimony as to whether respondent's

[illegible]

The Commission has been informed by the Government of the Republic of China that it has decided to accept the offer of the United States to provide it with military equipment and technical assistance.

There was a conflict in the testimony of the witness regarding the defendant's use of the telephone. The witness testified that the defendant had used the telephone to contact the witness on the night of the murder. However, the defendant's testimony was that he had not used the telephone on that night. The jury was instructed to consider the evidence and determine the truth of the matter.

current wife kept her house clean or dirty. There was some testimony that at times the subject child, Sheila, had a dirty neck, soiled clothes and uncombed hair. The respondent and his subject child were seen visiting a neighborhood tavern, the proprietor of which was a good friend of respondent. On occasion the subject child was cared for by a 16 year old baby sitter. On one occasion the subject child fell from the rear of a pick-up truck being operated by respondent's 16 year old daughter (by a former marriage) and received minor skin abrasions. On at least one other occasion, the child was observed to have been wearing a torn slip and dirty clothes.

The economic status of respondent appears to have remained substantially the same since the order entered November 5, 1955 modifying the decree. No change in character or moral stability has been shown, nor do we believe that any substantial pattern of neglect harmful to the health or moral welfare of the child has been shown.

The question directed to this court is whether the Chancellor abused his judicial discretion in denying the petition.

It is a settled rule that one seeking modification of the custody provisions of a decree has the burden of proof, to prove a material change in the circumstances affecting the welfare of the child. Arden vs. Arden, 25 Ill. App. 2d 181, Nye vs. Nye, 411 Ill. 408. The circumstances to be considered

[illegible]

are such material circumstances that have arisen since the decree, or the last order modifying same. Israel v. Israel, 8 Ill. App. 2d 284. Yantis v. Yantis, 17 Ill. App. 2d 555.

We must hold, therefore, that the modifying order last mentioned constituted res adjudicata as to custodial fitness and such order can be altered only on a showing of a change in material circumstances arising since its entry. Such question is almost impossible to review since there is a lack of proof as to the conditions existing prior to the modifying order of November 5, 1955. The Chancellor was faced only with evidence concerning isolated instances of minor or casual neglect. Certainly it cannot be concluded from the testimony that the child's health or moral welfare is in jeopardy. Not only do we hold that the trial court did not abuse its judicial discretion, but we concur in its exercise of such discretion in denying the relief sought. It seems to us that the Chancellor had no alternative in view of the lack of proof with respect to change in circumstances.

We find no error in the Chancellor's ruling and the order below is therefore affirmed.

AFFIRMED

REYNOLDS and ROETH, JJ., concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10328

Agenda No. 4

Warren Oller and Francis Ives,
Plaintiffs-Appellees,

vs.

Scherer Freight Lines, Inc.,
a Corporation,
Defendant-Appellant.

#

Scherer Freight Lines, Inc.,
a Corporation,
Counter Plaintiff-Appellant,

vs.

Warren Oller and Francis Ives,
Counter Defendants-Appellees.

ROETH, Justice.

This is an appeal from judgments of the Circuit Court of McLean County entered upon verdicts in favor of plaintiff, Warren Oller, in the sum of \$4,000.00 for personal injuries; and plaintiff, Francis Ives, for the sum of \$6,000.00 for damages to his tractor involved in the same collision, sustained from the alleged negligence of an employee truck driver of defendant in the operation of a tractor and semi-trailer truck.

Advised

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U.S. DEPARTMENT OF JUSTICE

General No. 1000

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There is no report of any payment of the \$100,000.00 to

William Smith, owner and operator of the [illegible] [illegible]

Office, in the sum of \$1,000.00 for personal services; the [illegible]

Thomas Lee, the sum of \$1,000.00 for services in the [illegible]

divisions in the same [illegible], [illegible] [illegible] [illegible]

of an employee [illegible] [illegible] [illegible] [illegible]

Station and [illegible] [illegible]

On appeal in this court defendant contends that the verdicts are contrary to the manifest weight of the evidence; that attorney for plaintiffs was guilty of misconduct, prejudicial to defendant, during the trial, which justifies reversal; and also that the refusal of the trial court to give two instructions to the jury constituted reversible error.

We have frequently held that where evidence is conflicting, it is for the jury to weigh the evidence and determine the credibility of the witnesses, and a verdict based upon conflicting evidence approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence. To be contrary to the manifest weight of the evidence an opposite conclusion must be clearly evident. Dinger v. Rudow, 13 Ill. App. 2d 444, 142 N.E. 2d 128; DeLong v. Whitehead, 11 Ill. App. 2d 330, 137 N.E. 2d 276; Green v. Keenan, 10 Ill. App. 2d 53, 134 N.E. 2d 115; Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E. 2d 363.

It is unnecessary to detail the evidence, but simply to observe that there appears to be a conflict on a question of fact between the evidence offered on behalf of plaintiffs, and that offered on behalf of defendant. The evidence on behalf of plaintiffs was, basically, the testimony of a State Patrolman and an

an appeal in this court without showing that the evidence
and contrary to the weight of the evidence; that the
independently was subject of discussion, mentioned in the
during the trial, which furnished testimony; and that the
refusal of the trial court to give the instruction of the law
was not reversible error.

The court accordingly held that there was a conflict
it is the duty of the court to give the instruction
conflict of the evidence, and a verdict based upon conflicting
evidence rendered by the jury would be reversed on appeal
appeal unless contrary to the weight of the evidence.
To be reversed on the ground of conflict of the evidence is
conflict of the evidence. People v. Jones, 17 Cal.
App. 2d 444, 105 P.2d 111; People v. Williams, 16 Cal. App.
2d 300, 103 P.2d 100; People v. Brown, 15 Cal. App. 2d 114.
11. 111; People v. Brown, 14 Cal. App. 2d 114, 115.
111.

It is unnecessary to recall the evidence, and simply to
show that there appears to be a conflict in the evidence
between the witness who testified in the trial, and the
evidence on which it is based. The evidence on which it is
based was, however, the testimony of a single witness.

eye witness; and the defendant's testimony was, basically, that of its own driver. It is sufficient to state that there was a basic conflict in the evidence, and that the jury believed the evidence offered on behalf of plaintiffs, which was sufficient to sustain the verdicts.

During the opening argument, counsel for plaintiffs stated "the other item I am going to ask you to consider is this, I am going to ask you what is the first hour and a half after the accident worth in dollars and cents to this young man". Another argument made on behalf of plaintiffs, after referring to the injuries, stated "How much would you take to go through something like that, to be underneath a tractor for an hour?". It was also contended that counsel for plaintiffs was guilty of improper conduct by discussing with a witness his testimony at a recess. This was done before defense counsel had an opportunity to cross-examine the witness. Defense counsel objected to both the argument, and also to the testimony of the witness at the time of its occurrence and after the witness had concluded his testimony. Counsel had also asked plaintiff on re-direct examination concerning whether defendant's truck gave any signal of a left turn. The court sustained an objection to the question and answer, and counsel sought to ask the question in a different form and objection thereto was again sustained on two additional occasions.

the witness; and the defendant's testimony was, basically, that
of the one witness. It is not unusual to find that there was a
basic conflict in the evidence, and that the jury believed the
evidence offered on behalf of plaintiff, which was sufficient
to sustain the verdict.

During the opening argument, counsel for plaintiff stated
the other, that I was going to ask you to consider the fact, I am
going to ask you what is your mind and a well known fact
connected with the witness and some of this young man. (pause)
argument once on behalf of plaintiff, after consulting the
evidence, stated that the fact was that the witness was
incompetent, and the defendant's evidence was correct. It was also
stated that counsel for plaintiff was guilty of a great deal
of association with a woman who testified as a witness. This was
also before the jury. (pause) In the opening of the defendant's
the witness. (pause) Counsel objects to both the statements,
and also to the testimony of the witness at the time of the
occurrence and after the witness had concluded the testimony.
Counsel had also asked plaintiff to testify that the defendant was
not a witness. (pause) Counsel was asked to ask the jury to
consider the evidence of the witness and the defendant's testimony.
Counsel sought to ask the jury to consider the evidence of the
the witness and again requested the jury to consider the evidence.

The question of pain and suffering of an individual and the period of time which he might have been pinned under the truck, under the circumstances, was proper, and the court ruling on the point indicated that the jury, of course, could consider all the pain that plaintiff had endured. In summation of an argument to a jury the widest latitude consistent with precedents and a reasonable interpretation of the record, and consistent with decorum, is given counsel, and control and regulation of such argument, unless there is a flagrant abuse, rests in the sound discretion of the trial court. Brown v. Sterling Abrasives Division, etc., 5 Ill. App. 2d 1, 124 N.E. 2d 607. On the question of the argument of plaintiffs' counsel with regard to the dollar value for the time plaintiff was pinned underneath the tractor, see the recent case of the Second District of Caley v. Manicke, #11423, decided February 23, 1961, 29 Ill. App. 2d 323, 173 N.E. 2d 209.

The objection to the effect that plaintiffs' counsel were guilty of improper conduct by talking to a witness during a recess is rather obscure. It is assumed that careful trial lawyers investigating a case, seek to talk to all interested witnesses to determine what such witnesses know. There is no contention that the attorney "primed" the witness, or that there was anything improper in talking with the witness prior to cross-examination. The record in fact shows that nothing was actually covered with

The question of guilt was left to the jury, and the
verdict of guilty was returned. The jury found the
defendant guilty of the crime, and the court sentenced him
to the state prison for a term of years. The court
also ordered that the jury be paid for their services.

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the witness after the incident that had not been covered in some respects prior thereto. The circumstance that the attorney for the defendant had the bailiff instruct the witness not to talk to anyone does not deprive counsel of the right to talk to the witness, and there is certainly no reversible error in the ruling of the court sustaining the right of counsel to talk with the witness and permitting the testimony of the witness to stand. Similarly, the objections made to the question relating to whether or not there was a left turn signal, could hardly constitute reversible error since objections were sustained to such question either on the ground that the questions were leading, or improper re-direct. The court sustained objections thereto and there was no reversible error arising therefrom.

Only two instructions which were tendered and refused by the court are now the basis of a contention of error. The first instruction was a lengthy instruction, combining a number of instructions which had been given, covering the very points set forth in the refused instruction. It was, likewise, objectionable, in being argumentative and in being repetitious. The other instruction sought to tell the jury that the jury was instructed that negligence or carelessness was a question of fact to be alleged and proved, and cannot be based upon conjecture, surmise

or guess, or because of some resulting damage, but must be traceable to some specific cause or negligence on the part of defendant. A tendered instruction which was given indicated that the defendant must be guilty of one or more acts of negligence complained of before plaintiffs could recover. The particular instruction under consideration, because of its sentence structure, said in substance that negligence or carelessness was a question of fact, traceable to some specific negligence on the part of the defendant. The language was such as to make it highly confusing, since negligence is stated to be traceable to negligence. It is apparent (and even implied in the argument presented by the defendant in this court), that the refusal to give the instructions referred to was not reversible error. Clarke v. Storchak, 384 Ill. 564, 52 N.E. 2d 229.

We must, therefore, conclude that since the evidence was conflicting on the issue of whether the defendant driver was on his side of the road or not at the time of the accident, and whether the collision was with the side or the rear of defendant's truck, the jury's determination must stand, and since there was no reversible error in the conduct of counsel in the trial of the cause, or in the refusal of the instructions complained of, the judgments of the Circuit Court of McLean County will, therefore, be affirmed.

Judgments affirmed.
CARROLL, P.J. and REYNOLDS, J., CONCUR.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

30 LA. 510

General No. 10354

Agenda No. 24

Elizabeth Thomas,

Plaintiff-Appellant,

vs.

Central National Life Insurance
Company,

Defendant-Appellee.

Appeal from the
Circuit Court of
Macon County.

REYNOLDS, J.

This was a suit against the defendant insurance company on three policies issued by the company, one a policy covering sickness and disability, one covering hospital expenses, and one covering surgical and medical expenses. Two of the policies were issued in January of 1958, and the other one in February of that year. On July 18, 1958, plaintiff became ill and remained ill until December 19, 1958. During that time she was hospitalized twice, once sixteen days and once two days. She was treated by Dr. Charles F. Downing of Decatur, Illinois.

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
JANUARY 1, 1934

1801A-15

January 1, 1934

General No. 1801A

Report of the
Illinois State Board of
Revenue

Elizabeth Thomas,
Illinois State Board of
Revenue,
General No. 1801A
January 1, 1934

REVENUE, J.

This was a suit against the defendant's personal property
on three policies issued by the company, one a policy covering
sickness and disability, one covering death benefits, and
one covering burial and funeral expenses. One of the policies
were issued in January of 1933, and the other two in January
of that year. On July 15, 1933, plaintiff became ill and
remained ill until December 15, 1933. During that time she was
hospitalized twice, once at St. Louis and once at St. Mary's.
was treated by Dr. Charles F. Johnson of St. Louis, Missouri.

The plaintiff made claim under the policies, and payment was denied by the defendant company on the ground that the condition that resulted in hospitalization was in existence prior to the issuance date of the policies.

In filling out the questionnaire of the insurance company in which certain questions as to the health of the applicant were asked, the plaintiff stated she was in good health and free from illness and bodily impairment, and answering a question asking her to state illness or injury with details for which she consulted a physician during past five years, she gave two items, one an appendix and female operation in 1927 and a fractured ankle in 1950, claiming complete recovery in both instances.

Dr. Downing testified he treated the plaintiff in May 1955, and at that time found her suffering from an acute duodenal ulcer, anemia and inactive syphilis. The doctor testified the ulcer was cured after about three months by diet and medicine. In the doctor's opinion the 1955 ulcer was cured and the one in 1958 was a new ulcer, although he admitted that a person having an ulcer made it a little more likely that the person could have another ulcer.

The matter was tried before the court and judgment was

The plaintiff made claim under the policy, and payment was

made by the defendant company on the ground that the con-

dition that resulted in hospitalization was in existence prior

to the issuance date of the policy.

In filling out the questionnaire of the insurance company,

in which certain questions as to the health of the applicant

were asked, the plaintiff stated she was in good health and free

from illness and bodily impairment, and was not taking any medicine

or having any injury or ailment at the time she filled out the

questionnaire. She stated that during the past five years, she had

undergone one operation in 1927 and a second

operation in 1929, claiming complete recovery in each instance.

Dr. Fleming testified he treated the plaintiff in 1927, 1928,

and at other times found her suffering from an acute nodular enter-

itis and inactive syphilis. The doctor testified the illness

was cured after about three months of treatment. He also

testified that in 1929, after she came back she was in 1929

was a new illness, although he admitted that a person having an

illness may have a relapse of the same illness at a later date.

Thereafter,

The matter was tried before the court and judgment was

entered for the defendant insurance company. The plaintiff appeals to this court.

The appeal presents two issues. First, was there an estoppel. Second, did the answer of the plaintiff in the application for the insurance defeat her claim because the answer withheld the information about her treatment for ulcer and other illness in 1955.

[1] Taking up first the question of estoppel, the contention of the plaintiff is that the defendant insurance company having first denied liability on one ground cannot later mend his hold and deny liability on another ground, citing Coulter v. American Employers' Ins. Co., 333 Ill. App. 631, Kuska v. Vankat, 341 Ill. 358, Ohio & Miss. Ry. Co. v. McCarthy, 96 U.S. 258, 267, and Larson v. Johnson, 1 Ill. App. 2d 36. The rule announced in those cases is that where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

In the case of Stoltz v. National Indem. Co., 345 Ill. App. 495, the application of the rule is on a different phase. In that case

... ..
... ..

and other things in 1957.

1. The system is a closed system and is isolated from the surroundings.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1. What is the purpose of the study?
 2. What are the research questions?
 3. What is the significance of the study?
 4. What are the limitations of the study?
 5. What are the conclusions of the study?

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[illegible]

the court holds that an insurer's denial of liability for loss claimed by an insured to come within the protection of the policy, such denial being based on grounds other than the insured's failure to file proof of loss, waives or renders unnecessary, compliance with the policy requirement respecting the filing of proof of loss.

However, the rule announced in these cases is not inflexible. In the Larson v. Johnson case, at page 45, the court speaks of inconsistent causes. Was the defense first raised by the defendant here, inconsistent with that raised later? In the first defense, defendant claimed the condition existed at the time of the issuance of the policies. Later, it defended on the ground that had it known of the plaintiff's ulcer and other illnesses in 1955, it would not have issued the policies. This is a far cry from the technical defense of failure to file proof of loss on the one hand and a defense on the merits on the other.

In the case of Dill v. Widman, 413 Ill. 448, at page 455, the court discussing the doctrine of equitable estoppel, said:-
"The general rule is that where a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the other, the one guilty of the

the court holds that the Government's burden of proving that
loss of control is an element of the offense is
the better, and that the Government's burden of proving that
the Government's failure to file a report of loss, within a reasonable
time, is negligence, is the better. The court concludes that the
burden of proof is on the Government.

However, the court concludes in these cases that the Government

burden. In the United States v. [redacted], the court

burden of establishing the Government's failure to file a report

by the defendant, is the better. The court concludes that the

in the first instance, the Government's burden of proof is on the

at the time of the filing of the report. The court concludes that

on the record that the Government's burden of proof is on the

therefore, it is the better. The court concludes that the

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the Government's burden of proof is on the Government's failure to

expressions or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts. Fraud is a necessary element but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow upon allowing a party to set up a claim inconsistent with his former declarations."

The case of The City of Quincy v. Sturhahn, 18 Ill. 2d 604, discussing estoppel, says; "The doctrine is invoked only to prevent fraud or injustice." The case of Ludlow Coop. Elevator Co. v. Burkland, 338 Ill. App. 255, holds that in order to establish the principle of estoppel, six elements must appear:

(1) Words or conduct by the party against whom the estoppel is alleged amounting to a misrepresentation or concealment of material facts; (2) Knowledge, either express or implied, that the representations were untrue; (3) The truth of the representations must be unknown to the party claiming the estoppel at the time they were made and at the time they were acted upon by him; (4) the party estopped must have intended or expect that his conduct or

representations would be acted upon by the party asserting the estoppel; (5) the representations or conduct must have been relied upon and acted upon by the party claiming the estoppel; and (6) the party claiming the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the other party was permitted to deny the truth of such representations or conduct.

[✓] In considering the cases, both those cited for the plaintiff and those for the defendant, it is the opinion of this court that there was nothing in the denial of liability by the insurance company on the ground that a condition existed prior to the issuance of the policies that caused the illness and hospitalization of the plaintiff, that is inconsistent with its later position that it would not have issued the policies, had it known of the ulcer and other conditions in 1955. There is no misleading of the plaintiff and no concealment. There was no knowledge that the claim that the condition existed prior to the issuance of the policies was untrue, and in fact there was no positive proof that such condition did not exist at the time of the issuance of the policies. There is nothing to show that the denial on the one ground amounted to fraud as to the later ground, or induced the plaintiff to act to her detriment.

representations were made by the party requesting
the company; (2) the representation of a party was made
been relied upon and acted upon by the party requesting the
company; and (3) the party claiming the right was not
to act, because of such representation. It is not, that he
could be prejudiced in the other party was prejudiced in the
the truth of such representation or not.

[1] In considering the case, both those of the plaintiff
and those for the defendant, it is the opinion of this court that
there was nothing in the denial of liability by the insurance
company on the ground that a condition existed within the
insurance of the policies that would make the insurance void. The
insurance of the policies, that is, the insurance with the
position that it would not have issued the policies, had it known
of the other and other conditions in 1904. There is no
finding of the plaintiff and no admission. There was no
finding that the claimant was not entitled to recover from the
insurance of the policies and other, and in fact there was no
positive proof that such condition did not exist at the time
of the issuance of the policies. There is nothing to show that
the denial of the one ground amounted to a denial of the other
ground, or indeed the ability to act in any manner.

The tendency of our judicial system as evidenced by our Practice Act and the decisions of our courts is not to permit technical grounds to prevent the doing of substantial justice. The tendency has been to liberalize the trial of litigated matters to the end that substantial justice will be meted out. To hold that the defendant in this case will not be permitted to show that it would have not have issued the policies to the plaintiff had it known of the acute duodenal ulcer and other illnesses of the plaintiff in 1955, and is estopped from making that defense, would be a decision on highly technical grounds. The two grounds of defense are not so inconsistent to warrant estoppel. The plaintiff was not misled since she knew of her physical condition in 1955.

The second point involved in this case is that of the answers of the plaintiff to the questions in the application for insurance. The question asked was: "State below illness or injury with details for which you have consulted a physician during past five years?". The answers of the plaintiff recited two illnesses or injuries, one an appendix and female operation in 1927, and the other a fractured ankle in 1950. Complete recovery was claimed in both instances. The plaintiff did not list or state

The tendency of our judicial system to overrule its own
precedents and the decisions of our courts is not a new
technical expedient to prevent the delay of administrative justice.
The tendency has been to liberate the trial of administrative matters
to the end that substantial justice will be noted and, to show
that the defendant in this case will not be permitted to show
that it would have not been bound by the policies to the plaintiff
had it known of the such a document about the other illnesses of
the plaintiff in 1955, and as a result of the other illnesses,
would be a violation of highly technical procedure. The two grounds
of defense are not an independent or distinct defense. The
plaintiff was not denied access to the court or the right of a fair trial
in 1955.

The second point involved in this case is that of the
violation of the plaintiff to the defendant in the plaintiff's
insurance. The question asked was: "Should the plaintiff be
treated with respect for which you have contracted a right to be
treated with respect?" The answer of the plaintiff was: "No."
Illnesses contracted, even as a result of the plaintiff's
1955, and the other illnesses which in 1955. The plaintiff's
was claimed in both instances. The plaintiff did not find it within

that she had been treated by Dr. Downing in 1955 for acute duodenal ulcer and other illness. Basing its defense on this failure, neglect, or misunderstanding, the defendant claimed in its affirmative defense, (1) that plaintiff had been treated and suffered from an ulcer and other undisclosed illnesses from May 15, 1955 through the date of the issuance of the policies, and (2) that the defendant company would not have issued its policies to the plaintiff had disclosure been made of the pre-existing condition of ulcer and other undisclosed illnesses on the part of the plaintiff.

[) Plaintiff claims the answers to the questions were literally true. That the question was ambiguous and where an ambiguity exists, it must be construed strictly against the insurer and in favor of the insured. In support of this contention plaintiff cites Craig v. Central Nat. Life Ins. Co., 16 Ill. App. 2d 344, Sheffer v. Suburban Casualty Co., 18 Ill. App. 2d 43, and Allstate Ins. Co. v. Urban, 15 Ill. App. 2d 386. An examination of these cases shows that they announce and sustain a general rule, namely that an ambiguity in the language of the policy of insurance which seeks to limit its liability will be construed most strongly against the insurer and liberally in favor of the insured. Here, the policy itself, is not involved, but the question and answer in the appli-

cation for insurance. The position of the plaintiff seems to be that having named two instances of medical or surgical treatment, the plaintiff was not compelled or need not disclose the time when she was treated for ulcer and other illness in 1955. The contention is that the question is answered by the answer of a single instance of treatment. That the question is in the singular. In that connection it may be noted that the plaintiff did not so regard the question as in the singular, but named two instances of treatment. However, we do not regard this matter as conclusive of the question involved, since the cause was decided upon another phase of the defense, namely, that had the plaintiff disclosed in her application the previous attack of ulcer and other illnesses in 1955, the company would not have issued the policies. The defendant was allowed, over the strong objection of the plaintiff, to show by its general counsel that if the illness and treatment in 1955 had been shown on the application the company would not have issued the policies.

The trial court in denying the motion for re-hearing, or in the alternative for a new trial, and in entering judgment for the defendant, relied strongly upon the language of Section 154 of the Insurance Code of 1937, (Sec. 766, Chap. 73, Ill. Rev. Stat.

1957) as interpreted in the case of Campbell v. Prudential Ins. Co., 15 Ill. 2d 308. This case was first tried in the Municipal Court of Chicago and resulted in a verdict for the plaintiff. On appeal to the Appellate Court it was reversed and remanded with directions to enter judgment for the defendant. Campbell v. Prudential Ins. Co., 16 Ill. App. 2d 65. The Supreme Court allowed an appeal of the case, primarily to determine the proper construction of Section 154 of the Insurance Code, which deals with the effect of misrepresentation by an insured in his application for insurance.

Section 154 of the Insurance Code (Ill. Rev. Stat. 1957, chap. 73, par. 766) provides:

"No misrepresentations or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with

actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to policies of marine or transportation insurance."

The Campbell case and this case have many points in common. In the Campbell case, Campbell took out two endowment at age 65 policies on his life. He died shortly after the issuance of the second policy and the coroner's certificate stated the cause of death was coronary thrombosis. In his application for the policies Campbell stated he had never had an ulcer, had not had any operations during the past ten years, had not lost any time during the preceding year because of illness and had not been treated by a doctor during the preceding five years. The evidence showed that he had been operated in 1948 for an abscessed peptic ulcer. Other evidence showed loss of time due to ulcer of gastrointestinal disturbances, within one year before his death and within one year before the issuance of the policies. In that case the question arose as to the extent of the burden an insurer must meet if it is to avoid liability upon a policy because of misrepresentation in connection with its issuance. The language of Section 154 of the Insurance Code that was construed was in the

retained intact to receive an additional witness at the
testimony of the fact of the injury sustained by the company.
This matter shall not apply to evidence of injury or death.
Deduction included."

The Campbell case and this case have been before the court
in the Campbell case, Campbell's case was the subject of an
appeal on the facts. It was finally after the hearing of
the second ruling and the court's certificate under the court
of death and injury included. In this application for the
policy Campbell failed to pay for death claim, but not for
any questions during the last few years, but not for any
years. The question was before the court and the court
ruled by a doctor during the hearing the facts. The court
ruled that he had been operated in 1918 for a hernia and
other. Other evidence showed loss of time due to injury to
intestinal operations, which was not before the court.
Within one year before the hearing of the policy. In 1918
the question arose as to the extent of the injury to the
fact it is to avoid liability under a policy issued in 1918.
Representation in connection with the hearing. The language of
section 121 of the Insurance Code that was contained in the

following words: "No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company." (Italics supplied.) The plaintiff there contended that the italicized word "or" should be read "and" so that the defendant must show both the materiality of the misrepresentation and an actual intent to deceive if it is to avoid liability. The defendant contended that its burden is satisfied if it establishes either a material misrepresentation or an intent to deceive. In the trial court the contention of the plaintiff was upheld. The Appellate Court in Campbell v. Prudential Ins. Co., 16 Ill. App. 2d 66 rejected this view, and the Supreme Court in Campbell v. Prudential Ins. Co. 15 Ill. 2d 308, at pages 312 and 313 also rejected this view holding that prior to the enactment of Section 154 of the Insurance Code in 1937, only a material misrepresentation of fact had any effect upon the liability of the insurance company. The court noted that the opinions of the Appellate Court differed as to whether a showing of actual deceit on the part of the insured in making the misrepresentation was also required. And the court called attention to a prior case by the Supreme Court,

Western and Southern Life Ins. Co. v. Tomasun, 358 Ill. 496, 502, where the court held that, at least in equity, a material misrepresentation would avoid the contract even though made through mistake or in good faith.

In the Campbell case the Supreme Court said the primary legislative purpose in enacting section 154 appears to have been to eliminate the rather refined distinctions that had been applied in determining the effect of false warranties and misrepresentations. That the section places representations and warranties, in policies issued since the passage of the Code, upon the same footing and has restricted the rules heretofore applied to warranties and broadened those applied to representations. The court found the section requires both warranties and representations to be stated in the policy or attached to it, if they are to have any effect upon the insurer's liability and that the uniform effect that it gives both to misrepresentations and to false warranties is a blend of some of the ingredients of the rules theretofore separately applied to each. And the court continuing said: "We see no reason why section 154 should not be read as it is written, in the disjunctive."

In summing up, the court said: "In our opinion the Appellate Court correctly held that a verdict should have been directed for

Section 10 of the Copyright Act, 1911

Where the work is a literary, dramatic, musical or artistic work, the author of the work shall, in the absence of any express agreement to the contrary, be entitled to the copyright in the work.

In the absence of any such agreement, the copyright in the work shall vest in the author of the work.

For the purposes of this section, the author of a literary, dramatic, musical or artistic work shall be deemed to be the person who has created the work, and where the work is a joint work, the authors shall be deemed to be the persons who have jointly created the work.

For the purposes of this section, the author of a literary, dramatic, musical or artistic work shall be deemed to be the person who has created the work, and where the work is a joint work, the authors shall be deemed to be the persons who have jointly created the work.

It is hereby declared that the provisions of this section shall apply to any work created after the commencement of this Act, and to any work created before the commencement of this Act which has not previously been assigned to another person.

Nothing in this section shall be taken to prejudice any right of an author in a work which may be conferred by any other law.

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the defendant. The testimony of defendant's expert witness relating to the materiality of the misrepresentations to the acceptance of the risk was undisputed. That the insured did not die from the affliction with respect to which information was withheld does not affect the materiality of the misrepresentation. (Weinstein v. Metropolitan Life Ins. Co. 369 Ill. 571, 578-9.) Nor is it significant that none of the doctors testified to a positive diagnosis of a recurrent peptic ulcer. The point is that the insured, by withholding relevant information, prevented the insurer from appraising the risk on the basis of the facts as they existed."

In considering the facts of this case in the light of the law as laid down by the Campbell case there can be only one conclusion. Whether intentional or through mistake, the plaintiff in making out her application for the insurance, withheld relevant information that prevented the insurance company from appraising the risk on the basis of the facts as they existed. The attorney for the defendant insurance company testified that the policy of the defendant company was to not insure where it was disclosed that the applicant had been treated for ulcers. It may well be that the ulcer of 1955 had completely healed. Dr. Downing is not

clear in his testimony as whether this was a recurrence of the old ulcer or a new ulcer. He did testify that in his opinion the ulcer of 1955 had been completely healed. He was not so positive as to whether the ulcer of 1958 was a recurrent ulcer or a new one. As in the Campbell case, that did not affect the materiality of the withholding of information about the previous ulcer.

The judgment will be affirmed.

Affirmed.

CARROLL, P.J. and ROETH, J., concur.

also in his testimony as to the fact that he had a knowledge of the
old ulcer at a new ulcer. He testified that in his opinion
the ulcer at 1915 was not completely healed. He was not in
positive as to whether the ulcer of 1915 was a new ulcer or
of a new ulcer. He is not positive that it was a new ulcer and
materiality of the evidence of his testimony about the ulcer.

ulcer.

The judgment will be affirmed.

WILLIAM

CARROLL, J. J. and HENRY, J. J. concur.

70 p. 316

Abstract

General No. 11440

(Abstract Only)

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(SECOND DIVISION)

OCTOBER TERM, A. D. 1960

2d
30 I.A. 216

EARL F. SHULTS, SR., for the benefit
of SYLVIA JEAN SHULTS and EARL FRANKLIN
SHULTS, Minors, and ELLEN SHULTS,

Plaintiff-Appellant,

vs.

HARRY KONTOS, d/b/a MARINE GRILL,
JOSEPH YOUNGREN, d/b/a HOMESTEAD
TAVERN, and CECIL HARGRAVE, d/b/a
CLYDE'S SHIP,

Defendants-Appellees.

Appeal from the

Circuit Court of

Kane County

SPIVEY--J.

The Circuit Court of Kane County denied the motion of Earl Shults, Sr. and Ellen Shults to vacate its orders of November 4, 1959, which orders (1) denied the motion of Ellen Shults filed April 16, 1958 to consolidate her separate dram shop action filed February 17, 1958 as cause number 58-195, with that of her two minor grandchildren being the instant action, number 56-1211, or in the alternative for leave to be made an additional party plaintiff in cause number 56-1211, (2) denied the motion of Earl Shults, Sr. and Ellen Shults filed September 24, 1959 requesting that they be made additional parties to cause number 56-1211, and (3) allowed the joint motion of plaintiff and defendant to dismiss with prejudice cause number 56-1211.

APPEAL

(Appellate)

October 10, 1940

IT IS

APPEAL FROM COURT OF ILLINOIS

SECOND DIVISION
(Second Division)

OCTOBER TERM, A. D. 1940

201A1018

STATE OF ILLINOIS, Plaintiff,
vs.
JOHN A. SMITH, Defendant.

Appeal from the

Appellate Division

Circuit Court of

Ill.

State County

JOHN A. SMITH, Plaintiff,
vs.
STATE OF ILLINOIS, Defendant.

Appellate Division

201A1018

The Circuit Court of Cook County denied the motion of
John A. Smith, Jr. and John Smith to vacate the order of November
4, 1939, which ordered (1) denial the motion of John A. Smith, Jr.
April 10, 1940 to consolidate his appeal from said order with
February 11, 1940 as case number 2-111, with that of Mr. Smith
which consolidated the lowest action, number 2-111,
or an alternative for leave to be made an additional party
plaintiff in case number 2-111, (2) denied the motion of John
Smith, Jr. and John Smith filed September 21, 1939 requesting
that they be made additional parties to case number 2-111, and
(3) denied the joint motion of plaintiff and defendant to dismiss
the consolidated case number 2-111.

Earl Shults, Sr. on June 24, 1956, became intoxicated as a result of the consumption of alcoholic liquors procured in taverns operated by the defendants. While so intoxicated he murdered his wife and for that offense he was sentenced to forty years imprisonment in the Illinois State Penitentiary.

The dates of the filing of the various pleadings and the rulings thereon are hereafter set out in chronological order.

June 24, 1956: Earl Shults, Sr. became intoxicated from drinking at the defendants' taverns and while in an intoxicated condition stabbed and killed his wife. (Later following a plea of guilty he was sentenced to forty years imprisonment in the Illinois State Penitentiary.)

October 29, 1956: Complaint numbered 56-1211 filed by plaintiffs and styled "Sylvia Jean Shults and Earl Franklin Shults, minors, by Pearl Rayborn their next friend." The complaint alleged the incident of June 24, 1956, charged that they as the minor children of Earl Shults, Sr., were injured in their means of support as the result thereof, and that they each suffered damages in the amount of \$15,000.

November 19, 1956, November 26, 1956, and June 6, 1957: Identical motions to dismiss the complaint filed by the three defendants on the ground that the plaintiffs do not have the legal capacity to institute the cause of action and are not proper plaintiffs to a dram shop action for loss of means of support.

February 17, 1958: Complaint numbered 58-195 filed by "Ellen Shults", mother of Earl Shults, Sr., seeking \$15,000 for loss of means of her support arising out of the same occurrence.

April 16, 1958: Motion filed by Ellen Shults to consolidate causes 56-1211 and 58-195 or in the alternative to allow her to be made an additional party plaintiff in cause 56-1211.

Carl Smith, Sr. on June 24, 1957, became intoxicated

as a result of the consumption of alcoholic liquors present in

beverage operated by the defendant. While so intoxicated he

murdered his wife and for that offense he was sentenced to twenty

years imprisonment in the Illinois State Penitentiary.

The dates of the filing of the various pleadings

and the rulings thereon are herewith set out in chronological

order.

June 24, 1957: Carl Smith, Sr. became intoxicated

from drinking at the defendant's tavern and while in an intoxicated

condition stabbed and killed his wife. (Later following

a plea of guilty he was sentenced to twenty years imprisonment in

the Illinois State Penitentiary.)

October 25, 1957: Complaint numbered 55-111 filed by

plaintiffs and styled "Evelyn Jean Smith and Carl Smith Smith,

Plaintiffs, vs. Carl Smith, Defendant." The complaint alleged

the incident of June 24, 1957, charged that they as the minor

children of Carl Smith, Sr., were injured in their minds and

support as the result thereof, and that they were entitled to recover

in the sum of \$15,000.

November 19, 1957: Answer filed, and June 6, 1957:

Identical motions to dismiss the complaint filed by the three

defendants on the ground that the plaintiffs do not have the legal

capacity to institute the cause of action and are not proper

plaintiffs to a civil action for loss of means of support.

February 14, 1958: Complaint numbered 55-112 filed by

"Allen Smith", mother of Carl Smith, Sr., seeking \$15,000 for

loss of means of her support arising out of the same occurrence.

April 18, 1958: Motion filed by Allen Smith to join

Carl Smith, Sr. as a party to the action and to amend the complaint to

include as an additional party plaintiff in cases 55-111.

September 3, 1958: Order of the Court allowing an oral motion of the minor plaintiffs in cause 56-1211 for leave to substitute Earl Shults, Sr., as party plaintiff in their stead and for leave to file an amended complaint for their use and benefit.

September 29, 1958: Amended complaint filed by Earl Shults, Sr., on behalf of his minor children seeking damages in the amount of \$20,000 as a result of the occurrence of June 24, 1956.

February 24, 1959: Motion of Earl Shults, Sr., filed asking that he be made an additional party plaintiff in the action originally filed by his minor children being cause number 56-1211.

September 24, 1959: Motion filed by Earl Shults, Sr., and Ellen Shults asking leave to be made additional parties to the action filed by the minor children and for an order on the attorney representing said minors to the end that Ellen Shults may receive a share of any proceeds recovered in cause number 56-1211.

November 4, 1959: Order of Court denying the motions of April 16, 1958 and September 24, 1959.

November 4, 1959: Order of Court upon joint motion of plaintiff and defendants dismissing with prejudice the action originally commenced by the minors.

November 24, 1959: Motion of Earl Shults, Sr., and Ellen Shults to vacate orders entered on November 4, 1959.

November 24, 1959: Suggestion of death of defendant Cecil Hargrave on July 15, 1956 filed.

March 11, 1960: Order of Court denying motion filed November 24, 1959 by Earl Shults, Sr., and Ellen Shults to vacate the orders of November 4, 1959.

May 9, 1960: Notice of Appeal filed by Ellen Shults and Earl Shults, Sr., from the order of March 11, 1960 and all previous orders adverse to Ellen Shults.

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118 THE BIBLE, ITS HISTORY AND ITS CRITICISM

Appellants contend that the 1955 amendment, effective July 1, 1956, to Article VI, Sect. 14 of the Liquor Control Act, Chap. 43, Sect. 135, Ill. Rev. Stat. 1955 changed actions under that section for injuries to means of support to that of a class action, that as a member of the class she had always been a party to the action by representation. She contends that her intervention after one year from the date of the occurrence was not barred by the statute of limitations by virtue of Section 46 of the Practice Act dealing with amendments.

The 1955 amendment to Section 135 became effective on July 1, 1956. All actions filed thereunder following that date are governed by the 1955 amendment regardless of the date of occurrence. The provisions thereof control as to the time within which the action must be commenced, the amount of recovery allowable and the party in whose name the action must be commenced.

In Fourt v. DeLazzer, 348 Ill. App. 191, 108 N.E. 2d. 599, it was said, "The limitation provision of the Act as in force and effect at the time of the claim was filed governs, rather than the limitation provision which may have been in effect when the occurrence giving rise to the claim happened. (DuQuoin High School Dist. 100 v. Industrial Commission, 329 Ill. 543, Hilberg v. Industrial Commission, 380 Ill. 102). Since the right of action is purely statutory under the Dram Shop Act the courts jurisdiction could only be exercised subject to the limitation prescribed by the statute which was in force and effect when the court's jurisdiction was invoked. (Sharp v. Sharp, supra.)"

It was further held that the time limit placed on the commencement thereof is a condition of liability and a necessary element of the cause of action.

As a result of the 1955 amendment in effect at the time of the filing of the original complaint, a person having a right

of action under the Dram Shop Act must file the action within one year from the date of the occurrence to invoke the jurisdiction of the court. The time fixed for the filing of such actions is an integral part of the cause of action and not a statute of limitation.

In Shelton v. Woolsey, 20 Ill. App. 2d. 401, 156 N.E. 2d. 421, it is said, in referring to the Dram Shop Act, "Those statutes which create a substantial right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitations."

We quote from Thompson v. Capasso, 21 Ill. App. 2d. 1, 157 N.E. 2d. 75, "We believe that the legislature, by the 1949 amendment, did not intend that the provisions of the Limitations Act should be applied to causes of action filed under authority of the Dram Shop Act, if 'the evil to be eliminated by the amendment was the prolonged liability . . . of dram shop owners and operators.' Orlicki v. McCarthy, 4 Ill. 2d. 342."

In considering in whose name a cause of action for injuries to means of support should be brought under Section 135, as amended in 1955, the court in Steller v. Miles, 17 Ill. App. 435, 150 N.E. 2d. 630, had this to say, "The amendment then provides that, 'such action shall be brought by and in the name of the person injured or the personal representative of the deceased person, as the case may be, from whom said support was furnished.' This latter provision establishes that the action shall be maintained by a single representative of the class of persons who qualify as those injured in their means of support. * * * Taking the language of the foregoing provisions together and in their plain and ordinary meaning, * * * it definitely establishes that actions for loss of support may not be maintained by the individual or individuals suffering such loss but must be brought either by

of action upon the Board they not must like the action within a year from the date of the occurrence to invoke the jurisdiction of the court. The time limit for the filing of such actions is an integral part of the cause of action, and not a matter of

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24. 11. It is noted, in relation to the Green Book, that the
Association which creates a substantial right unknown to the common
law and in which there is some an interest element of the right
is protected. The right is substantial.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first question is whether the defendant is a citizen of the United States. The answer is yes. The defendant is a citizen of the United States.

the provider of the support or by his personal representative in case such provider is deceased. * * * The Act specifically designates the persons who may bring the action which it creates and those persons are either the injured provider of support or his personal representative. The express mention in the Act of the persons authorized to bring the action thereunder impliedly excludes all other persons. Howlett v. Doglio, 402 Ill. 311."

In the instant case as in all purely statutory rights of recovery unknown to the common law where the time limitation for filing the cause of action is made an inherent element of the right so created, amendments to the complaint substituting a proper party plaintiff for one who had no right of action do not relate back to the original complaint so as to toll the time limitation for filing the action. Bodine v. Lloyd, 287 Ill. App. 636, 5 N.E. 2d. 108; Keslick v. Williams Heating Corp., 277 Ill. App. 263, aff. 360 Ill. 552, 196 N.E. 814; Friend v. Alton R. R. Co., 283 Ill. App. 366.

In the actions we are considering, neither properly invoked the jurisdiction of the trial court. Causes numbered 56-1211 and 58-195 were both defective in that they were not instituted by persons entitled to maintain the action within one year following the date of the occurrence. Nor will the amendment, after one year from the occurrence, of cause number 56-1211 breathe life into that action.

Appellants suggest the case of Geneva Construction Company v. Martin Storage and Transfer Company, 4 Ill. 2d. 269, 122 N.E. 2d. 564 as authority for their right to intervene by amendment under Section 46 of the Practice Act, Chap. 110, Sect. 46, Ill. Rev. Stat. 1955, and thus toll the statute of limitations.

In the Geneva Construction case the court was applying Section 46 in a common law subrogation case as it would affect the Statute of Limitations, Chap. 83, Sect. 15, Ill. Rev. Stat. 1955. What the court said in that case is not applicable in the instant statutory case.

In our opinion the trial court committed no error in denying the motion of Ellen Shults to consolidate her suit number 58-195 which stated no cause of action with cause number 56-1211 which also stated no cause of action and the motion of Earl Shults, Sr., and Ellen Shults for leave to be made parties plaintiff in cause number 56-1211 which stated no cause of action. The allowance of either of these motions would not have afforded Ellen Shults a right of recovery for injury to her means of support.

The record is barren of the reason for allowing the joint motion of plaintiff and defendant to dismiss cause number 56-1211. However, the dismissal was fully justified in that neither the complaint nor the amended complaint stated a cause of action for the reasons hereinbefore stated.

In view of what has already been said, it will be unnecessary to consider the additional defense raised by the appellee Hargrave.

The orders of the Circuit Court of Kane County will be affirmed.

Affirmed.

Crow P.J. and Wright J. Concur

5-7-60

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Abstract

General No. 11443

Agenda No. 14

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - FIRST DIVISION
October Term, A.D. 1960

FILED

MAY 6 - 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

ROBERT WORDEN, et al.,
Plaintiffs-Appellees,
vs.
STATE POLICE MERIT BOARD, et al.,
Defendant-Appellants.

130 I.A. 223
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Appeal from the
Circuit Court of
Bureau County.

DOVE, J.

This proceeding originated when William H. Morris, Superintendent of the Division of State Highway Police of the department of Public Safety filed with the State Police Merit Board written complaints which sought an order directing the Superintendent of State Highway Police to discharge Robert Worden, Albert J. Barauski, John P. Stepanitis and Paul W. Ellison from the State Highway Police force. At the first hearing before the Merit Board on December 15, 1958 the causes against the several respondents were consolidated. Respondent Ellison tendered his resignation as a police officer which was accepted. Counsel for two of the remaining respondents then moved for a severance and also moved for a bill of particulars. These motions were denied and a hearing had, resulting in an order, entered March 23, 1959, finding that Worden, Barauski and Stepanitis had violated designated articles of the rules and regulations of the Illinois State Highway Police and directing the Superintendent of the State Highway Police to discharge these officers.

On April 17, 1959, the said respondents, Robert Worden, Albert J. Barauski and John P. Stephanitis, filed in the Circuit Court of Bureau County their complaint which recited the foregoing facts and requested a judicial review of this decision and prayed for the entry of an order reversing the order entered by the State Police Merit Board. The answer of the Merit Board consisted of a transcript of the proceedings had before that Board and upon a hearing, an order was entered reversing the decision of the Merit Board. To reverse that order the Merit Board appeals.

The complaint of Superintendent Morris directed against Sergeant Worden alleged that Worden on February 6, 1950, was employed as an officer of the Division of State Highway Police and continued in such employment until he was suspended from his duties on October 4, 1958. The charge made against Worden in paragraph 2 of the complaint is: That on September 4, 1958 at about 3 o'clock a.m. he permitted a truck of excessive width and weight, belonging to White Brothers Trucking Company to move along the State Highways of Illinois without the owner or operator thereof having a valid permit for such operation. The charges made against Worden in paragraph 3 of the complaint are: That on August 11, 1958 and at numerous other times and places he conspired with State Police Officers of District 7 and with personnel of Contracting and Material Company of Evanston, Illinois, and with other trucking companies, to escort drivers of second division vehicles of excessive weight and width, between sunset and sunrise, along the highways of this State, particularly along State Routes 2, 92 and 80, without having valid permits for such operations. The operations and statements in furtherance of this conspiracy were enumerated as follows:

- (a) Escorting the driver of an overweight and/or overwidth truck owned by Contracting and Material Company on Route 92 about one o'clock a.m., August 11, 1958, said truck having been stopped by Corporal DeMaught.

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- (b) Escorting the driver of a truck belonging to Contracting and Material Company about one o'clock a.m. August 11, 1958 on Route 2, the driver of said truck being about to be apprehended by Trooper Hockett for operating the truck in the wrong traffic lane.
- (c) Escorting the driver of a truck of excess weight and/or width belonging to Contracting and Material Company on and along Route 92, near Andalusia, Illinois, on August 8, 1958 while said vehicle was operating without a valid permit for such operation.
- (d) Waiting for, and declaring his intention to Troopers McCorkle and Geiger to move a truck of Contracting and Material Company then being driven by James H. Edelman, and there stating to them that "the railroads move heavy equipment and I don't think anything is wrong in trucks doing the same."

As to Sergeant Barauski the complaint alleged that he was employed as a highway police officer on March 28, 1949 and continued in such employment until he was suspended from his duties on October 11, 1958. The charge made against this officer was that on or about August 19, 1958 he knowingly or intentionally conspired with personnel of Contracting and Material Company of Evanston, Illinois, and knowingly permitted a truck of that company of excessive weight and/or width, to be driven by James H. Edelen along Route 30, without a valid permit having been issued for such operation.

As to Sergeant Stephanitis the complaint alleged that he was employed as a highway police officer on July 15, 1941 and continued as such officer until November 27, 1955 when he was disciplined for three days for neglect of duty and disobedience to a superior officer; that from and after December 1, 1955 he continued in his employment as a police officer until April 30, 1956; when he was confined to barracks for 5 days for disregarding curfew and for falsifying records; that on July 9, 1956 he was suspended from duty for ten days and again suspended from duty on August 24, 1957 for a further period of fifteen days; that thereafter he continued his duties as State Police Officer until his suspension on October 3, 1958. The complaint then alleged that Stephanitis on August 6, 1958 entered into a conspiracy with

other persons to violate the overweight and overwidth statutes of this State and in furtherance of said conspiracy, counseled with, and tried to assist John Ferrie, a truck driver, employed by Contracting and Material Company to move a truck, of excessive weight and width, along State Highways 2 and 92 without a valid permit so to do. This complaint further charges that at numerous times during the year 1958 Sergeant Stephanitis conspired with others and assisted personnel employed by said Contracting and Material Company, to move trucks, of excessive weight and width, along and upon the highways of Illinois, without valid permits having been obtained therefor.

The Merit Board found Worden guilty of permitting a driver of an overwidth or overweight truck of White Brothers Trucking Company to move on and along a State highway without the owner or operator having a valid permit for such operation as charged in the second paragraph of the complaint directed against Worden. The evidence found in this record upon which this finding is based was the testimony of Robert K. Klemm who testified that he was State Highway Patrolman, assigned to District No. 7 and on September 4th was working the midnight to 8:00 o'clock shift; that Worden worked on the 4:00 o'clock to 12:00 o'clock daylight shift, was not his superior officer and was not on duty at the time of this occurrence; Klemm further testified that Trooper McCorkle and Trooper Terry Waterhouse were the other officers working that night in this particular area; that he had a conversation about 3:00 o'clock that morning with Worden when no one else was present in which Worden told Klemm that there was an overweight truck with a piece of machinery on the highway but for Klemm to "just leave it go, just disregard it". Klemm also testified that Worden said he had told Trooper McCorkle the same thing that he had told Klemm. Klemm further testified that about 5:00 o'clock that morning he saw the truck referred to by Worden on Route 67 going through Milan; that it was a caterpillar type truck, used to haul equipment and commonly known as D-9, and belonged to White Brothers. Klemm further testified that he asked Worden: "If this truck was to be exempt and if so, how that came about?" That Worden

[illegible]

replied: "Well, the railroad moves overweight and overlength equipment all the time and he didn't see why this couldn't be moved." Trooper McCorkle testified upon the hearing in connection with other matters but was not interrogated about this occurrence which took place on September 4, 1958.

Sergeant Worden testified that on the evening of September 4, 1958 he was working at the desk at the State Police Office in Rock Island; that Trooper Donald E. Hockett talked to him over the phone that evening stating that he had a problem which was about an overwidth truck which had a permit to move in daylight hours but the operator would like to leave before daylight in order to avoid heavy shop traffic; that Worden told him that if he did not want to get into the heavy shop traffic he would have to wait until the heavy traffic went by; that later Trooper Klemm came in and Worden explained the situation to him. According to Worden his conversation with Klemm was in front of police headquarters in Rock Island after his tour of duty at midnight; that he had no conversation with Klemm around 3:00 o'clock in the morning but was home in bed at that time. Worden denied telling Klemm anything about an overweight truck with a piece of machinery and for him, Klemm, to leave it go. Worden denied that he told Trooper McCorkle the same thing, denied that he ever said that "railroads move overweight or heavy pieces of equipment all the time and that he didn't see why this could not be moved". Giving credence to officer Klemm's version of his conversation with Worden it falls far short of sustaining the charge that Worden on September 4, 1958 permitted White Brothers Trucking Company to move an overwidth or overweight truck along a state highway without the owner or operator having a valid permit for such operation. The evidence is that Worden was not on duty at the time and Klemm testified that he was not his superior officer. There is no competent evidence that the truck owned by White Brothers was overweight or overwidth or if it was that it did not have a permit for its operation. The finding of the Merit Board that Worden was guilty as charged in paragraph 2 of the complaint is not supported by the evidence found in this record.

Inasmuch as the Merit Board found Worden, Barauski and Stephanitis also guilty of conspiracy as charged in the several complaints it is necessary to review the evidence found in the record to support/William T. Hall, that finding. testified that for ten years he had been connected with the Illinois State Highway Police Force; that his duties are those of an investigator and in the course of his investigation of the charges against appellees he contacted, among others, John Ferrie and James H. Edelan Jr. employees of Contracting and Material Company of Evanston, Illinois. Sergeant Hall was then permitted to testify that Ferrie, on September 13, 14 or 16, 1959, told him (Hall) that when, he, Ferrie was arrested on August 6, 1958 by Trooper Hockett, for operating an overweight, overlength and overwidth truck, he called his boss, Art Cagney; that previously Cagney had told him to leave on this particular trip at 10:00 o'clock p.m. on August 5, 1958 and drive right through to Rock Island; that police scales were on Route 30 and also on Route 51 and for him to by-pass the scales and directed him how to do so; that Cagney further told him, Ferrie, that Stephanitis would meet him somewhere on a country road and that Stephanitis would be in a squad car, in uniform and would be looking for him. Sergeant Hall then testified that Ferrie said, after his arrest, that he, Ferrie, told Trooper Hockett that he would like to make a phone call and Hockett took him to a pay station and Ferrie talked by phone with Cagney. Hall then testified that Ferrie told him that he, Ferrie, after he talked to Cagney, received a call from Ellison, a member of the Highway Police Force and that Ellison said he wished to talk to Hockett; that Ellison did talk to Hockett and after doing so, Hockett took the keys of the truck and left and Ferrie remained with the truck; that about an hour later Stephanitis, in uniform, came and told Ferrie, that he, Stephanitis, had missed Ferrie on Route 2 and on Route 96; that Ferrie then asked Stephanitis what he could do for him, and Stephanitis replied:

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with little or no regard to the needs of the community.

2. 1941-1942, 1943-1944, 1945-1946, 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684,

"There is nothing I can do for you now. I can't fix it now. Just don't tell anybody that you saw me or mention that I was here this morning". Hall further testified that on August 17, 1958, he, accompanied by Sergeant Sanders, again interviewed Ferrie at which time he said to Ferrie: "Will you be good enough to repeat those statements again so Sergeant Sanders can hear them?" Hall then testified that Ferrie "repeated them in the same manner". Sergeant Sanders was not called as a witness.

Sergeant Hall further testified that during the course of his investigation of this matter he, on October 8, 1958 contacted James H. Edelen in Davenport, Iowa; that Hall was accompanied by Lieutenant Phil J. Toffert, another investigating officer; that Edelen told them about an incident occurring near New Boston when he talked to Troopers Geiger and McCorkle stating that he, Edelen, tried to get those Troopers to call Sergeant Stephanitis to handle this incident; that McCorkle and Geiger said Stephanitis was not working that day but Edelen told them he was because he, Edelen, had seen him at about 7 o'clock a.m. when he was coming down another road; that he, Edelen, at that time inquired of Stephanitis the route he should take to miss the scales and Stephanitis told him how to proceed and for him to go ahead with his load. Hall further testified that ~~from him~~ Edelen told him that about a week or so later, he had parked his rig on the shoulder and at that time was questioned about a permit by McCorkle and Geiger and that he, Edelen, told these Troopers that he did not have a permit. While it does not appear from Hall's testimony just what incidents Edelen was referring to or the date of this occurrence, Hall's testimony, when considered in connection with the testimony of Geiger and McCorkle would indicate that the dates of these occurrences were July 31, 1958 and August 18, 1958. Hall concluded his testimony by stating that Edelen "kept repeating to us, 'how do you think I got through District One? How do you think I got this far? You don't think I came this far on my own,

do you? I came through District One with the full knowledge of Sergeant Barauski'".

Robert Geiger testified that he was a State Trooper on July 31, 1958 and with Trooper McCorkle investigated an accident in which a truck of Contracting and Material Company driven by James Edelan, was involved. This witness testified that he inquired of Edelan whether he had a permit and Edelan said: "He knew he was supposed to, but it was okayed by Sergeant Stephanitis". This witness further testified that on August 18, 1958 he was patrolling Route 67 and saw the same truck and a similar load parked off the highway at a drug store; that he recognized Edelan as the driver and inquired of him whether he had a permit this time and Edelan said he didn't. As the truck was off the highway nothing further was said or done except Edelan said in reply to a question as to how he got there, that Sergeant Barauski brought him down that far and then turned him over to Sergeant Worden. This witness further testified that he saw Sergeant Worden a short time thereafter and told him about it and Worden said he would take care of it.

Wm. C. McCorkle testified that he was a State Trooper assigned to District 7 and on the morning of July 31, he and Trooper Geiger investigated an accident involving a truck and later met the driver of the truck and saw him again about the middle of August; that about 20 minutes after they saw the truck on July 31, 1958 they met Worden and told him about the equipment and Worden said he would go and see about it and further said that if railroads could move their equipment in an emergency he didn't see why this company couldn't move theirs. McCorkle further testified that he thought the truck was overwidth and overweight but he didn't measure it or have any proof of that.

John Ferrie, testified that he lived in Evanston and was employed by Contracting and Material Company as a truck driver and was so engaged on August 6, 1958, at which time he was driving a Mack Truck, carrying a D-9 Tractor; that he did not remember whether on this occasion, when he

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left Wheeling with the truck, Mr. Cagney told him or did not tell him that he would be met by Sergeant Stephanitis; that he did not know Stephanitis; that he knew he needed a permit to travel but did not have one and after he was arrested by Hockett he called Cagney by phone; that he was taken to court, found guilty of violation and fined a little over \$3000.00 and the fine was paid.

Arthur Cagney was called as a witness on behalf of the Board and testified that he was employed by Contracting and Material Company to take care of two-radio calls; that he had no interest in the company for which he worked and was not a dispatcher for the company and did not route the trucks of the company. He stated he did not know Sergeants Worden, Barauski or Stephanitis; that he recalled that one of the trucks of the company left Wheeling on the evening of August 5, 1958 and was stopped at Silvis the next morning; that he knew John Ferrie, a truck driver for the company and following his arrest on August 6, 1958 he had a conversation with him and when asked what was said in this conversation the witness stated: "I refuse to testify about anybody or testify to anything not concerning these three officers".

Donald E. Hockett testified that he was a State Trooper; that on August 6, 1958 he stopped a truck of Contracting and Material Corporation, being driven by John Ferrie; that he Hockett, told Ferrie that Ferrie had made a mistake in driving past the weigh scales and that he would have to go back; that Ferrie inquired of him whether he knew Stephanitis and Hockett replied that he did; that he, Hockett, then permitted Ferrie to make a phone call and later, Ferrie reported to Hockett that someone would like to talk to Hockett and Hockett then had a phone conversation with Ellison; that in the conversation Hockett had with Ellison, Ellison stated that Ferrie's employer had been very good to the men in his area and wanted to know if it was possible to let the truck go; that he, Hockett, told Ellison that he could not let Ferrie go but that he would see Sergeant

Worden and do what he told him to do. Hockett further testified that he took the keys of the truck, told Ferrie where he was going, drove south and met Worden, and there told him of his, Hockett's, conversation with Trooper Ellison, and asked Worden what he, Worden, wanted Hockett to do; that Worden replied that he was not having any part in a thing like^{that} and he didn't know Ellison. Hockett testified that he then said to Worden: "What do you want me to do?", and Worden told him to wait until a little more reasonable hour and then call the Lieutenant and find out what he wanted done. Hockett testified that after he had had his breakfast that morning he called Lieutenant Casey who told him to take the truck to the scales and handle it just like any other illegal truck and Hockett stated that he did so.

Trooper Hockett further testified that in the early morning of August 11, 1958 he was riding his regular patrol and saw a truck loaded with a bulldozer on Route 150, a four lane road at that point; that there was a slight curve, and Hockett observed that the truck was in the wrong lane; that as he started to overtake the truck he received a radio call from Worden stating that he, Worden, would take care of the truck. Hockett further testified that he was unable to tell the weight or width of this truck and after receiving Worden's message, he did nothing further. Later that morning, however, in a restaurant in Moline, he saw Worden and asked him how he made out with this truck and Worden replied that he talked to^{and} the driver; that the driver had a permit which he checked, /that he then let him go.

Morris DeMought testified that his rank was that of Corporal in the State Highway Police Department and that he was working the midnight to eight o'clock a.m. shift, on August 11, 1958; that he was coming out of a drive-in about 1:00 o'clock that morning and observed the truck which Trooper Hockett testified about and observed it moving on Route 92; that he

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1. The first step in the process of identifying a potential threat to national security is to determine whether the information is classified. If the information is classified, it is then necessary to determine whether the information is relevant to national security. If the information is relevant, it is then necessary to determine whether the information is a threat to national security. If the information is a threat, it is then necessary to determine whether the information is a threat to national security.

thought the truck was overweight and overwidth and stopped the truck; that he didn't know the driver but inquired of him what he was doing on the road on Sunday; that about this time, Sergeant Worden came up in his squad car and said: "This guy is alright, I'm taking him through". The corporal then asked Worden: "Where did you get your orders for that?" and Worden replied that he received a call from Springfield to the effect that this truck was going through and that he, Worden was to take it through.

John Ernhart testified that he was a State Trooper and assigned to District 7; that between one o'clock and 3:00 o'clock a.m. on August 8, 1958 he saw the truck of Contracting and Material Company parked off the side of the road; that he pulled his car behind it and received a radio signal from Sergeant Worden; that the signal he received from Worden meant for him to disregard whatever he was doing and indicated that Worden had checked the driver of the truck and that the driver had a permit. In response to questions, at the conclusion of his cross-examination, directed to him by each of the three members of the Merit Board this witness testified that he did not know where Sergeant Worden was at the time he signalled the witness but that the witness assumed the message came from a car that went by.

Paul Ellison was called by the Board as a witness and stated that he did not know Stephanitis but did know Barauski; that on or about August 7, 1958, he called Worden by phone "to see if this truck (driven by Cagney, and belonging to Contracting and Material Company) could be moved legally and just what the procedure exactly was, and how to proceed to get them out of here"; that Worden told him that he could not help him and that the equipment had to be weighed at the scales. On advice of counsel, this witness refused to state whether or not he had had any telephone conversation that morning with Arthur Cagney.

William H. Morris testified that he had been Superintendent of Illinois State Highway Police since 1956; he ^{then} ~~has~~ identified the respondents as being present in court and testified to what the records disclosed as to their respective services as police officers, substantially as alleged in the several complaints. Mario Valente testified that she was employed

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in the Permit and Engineering Office of the Division of Highways and that her duties involve the issuance of permits for the movement of oversize vehicles. In her testimony she stated what the rules and regulations of the highway division provided which governed the issuance of permits. Robert Gronwald testified that he was the district manager of the General Telephone Company which operated in the area where the several occurrences involved herein took place and he identified several toll tickets and records indicating telephone calls which were made on August 7, 1958, by some of the parties involved in the proceeding.

Sergeant Worden was called by the Merit Board and testified as an adverse witness under Section 60 of the Practice Act. His testimony covers 34 pages of the record. He also testified at length, in his own behalf. He stated that his first contact with Contracting and Material Company was on August 6, 1958 when he stopped a truck of that company which was being driven by Ferrie which had gone past the weighing scales at Silvis; that a call had been made to the Rock Island Police Station and in response to that call he arrested Ferrie. Worden denied having had the conversation with Corporal DeMought, as testified to by the corporal, and denied making the statement that "railroads move heavy equipment and that he didn't think there was anything wrong in trucks doing the same". In addition to testifying about the occurrence of September 4, 1958 as hereinbefore indicated, Worden referred to the incident on August 11, 1958, about which DeMought and Hockett testified. Worden said that the truck involved upon that occasion was not overweight or overwidth; that the only indication of any violation was that it had made a wrong turn. Worden denied that there had been any conversation at the restaurant the next morning about a permit and denied that he said he had talked to the driver or checked with him and denied the statements attributed to him by officers Geiger and McCorkle.

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John P. Stephanitis was called as a witness by the Department and testified that he was a State Police Sergeant and had never met Cagney until December 15, 1958 the day Cagney testified upon this hearing; that he had never had any telephone conversation with him or the members of his firm, Contracting and Material Company; that he did not know John Ferrie or James Edelan and had never had a conversation with either of them and had no knowledge or connection with this company or any of the truck drivers of the company and ^{never} stopped or arrested any of the drivers of trucks of this company and never had occasion to do so. This witness further testified that he knew Sergeant Barauski but that they worked in different districts and that the first time he met Paul Ellison was on November 4, 1958.

Albert Barauski testified in his own behalf that he had been a State Police Officer for ten years and a Sergeant for eight years; that he lived in DeKalb; that Sergeant Stephanitis lived in Spring Valley; that he, Barauski did not have a personal acquaintance with Stephanitis but had made an unsuccessful attempt to call him by phone. He further testified that between July 30, 1958 and August 27, 1958 he had talked over the phone to both Worden and Ellison several times; that one call had to ^{do} with an ammunition loading equipment, another phone call had to do with an outboard motor equipment and another phone call was about a gun sight. This witness further testified that he did not know Cagney, or Edelan and had not talked personally or by telephone to any one connected in any way with Contracting and Material Company and that none of his phone conversations with Worden had anything to do with the movements of any trucks along highways of this State.

During the hearing and at the conclusion of Trooper Geiger's testimony one of the members of the Board, which was conducting the hearing, said to the witness: "Is it your opinion, or was it the opinion of the troopers, and give me an honest answer, that there was some agreement among the Sergeants in District 7, or among the Sergeants in any other district, that there were some trucks going by with the knowledge of the Sergeants

of that district, traveling at that time?". The witness answered: "We thought so, at times, yes sir". The board member then asked: "Will you tell me how many Sergeants the men felt were to be in it? Did you have any opinion as to any particular ones?" Trooper Geiger answered: "No, sir. We really didn't know, it was just an opinion". The board member then said: "I just wanted an open answer. But you did discuss it; that some of the Sergeants here had been doing it?". "Well sir", answered Geiger: "We came to the conclusion that there was something not all right".

Again at the conclusion of Trooper Hockett's testimony, a member of the Board asked Hockett this question: "What is the feeling among the Troopers in District 7? Was there a feeling that there were some trucks getting by that shouldn't have? I want you to answer the question fairly". Hockett replied: "I am quite sure they are of that opinion, that some of these trucks were being helped through".

Again while Investigator Hall was on the stand he was asked to detail a conversation he had had with John Ferrie, the driver of a truck owned by the Contracting and Material Company. An objection was made by counsel for Sergeant Stephanitis. The Board overruled the objection after counsel for the Board stated: "We are proceeding on the theory that there was a conspiracy and Ferrie and Cagney were at least involved. The rule in that situation is that the acts of any conspirator may be used against all the conspirators. If his testimony is against one conspirator, it is against all of the conspirators. That is the purpose for which I have placed Sergeant Hall on the stand". At another time during Hall's examination he was asked to relate a conversation he had had on October 8, 1953, with James H. Edelan, the driver of another truck for Contracting and Material Company. Counsel for Stephanitis objected and counsel for the board then said: "It is all a part of the conspiracy. The driver (Edelan) was a conspirator". The Board member then said to counsel for the Board:

"Is the driver in your opinion, a common conspirator?" and counsel answered: "Yes, before the case is concluded, we will show how they worked together in a conspiracy". Counsel for one of the respondents then said: "There is no one yet shown to be a conspirator". Thereupon a member of the Board inquired of its counsel: "Is it your theory that this driver (Edelan) and Cagney were conspirators?", and counsel for the Board answered: "Yes, Cagney is the man who has testified here. These two make a conspiracy and the acts of one is evidence against the acts of the rest of the conspirators".

When counsel for the Board stated that before the case was concluded a conspiracy would be shown, Hall had already testified at some length and the Board had heard the testimony of Morris, Worden (under Section 60 of the Practice Act) Volente, Cagney, De Mar, Gronewald, Ferrie, Hockett, DeMought, Ernhart, Klemm, Geiger, McCorkle and Ellison. In fact it was just before the Department rested its case. To learn, at this stage of the hearing, that the Board's counsel considered Edelan, a conspirator and that^a conspiracy would be shown before the case was concluded, evidently came as a surprise to the Board because one of its members then inquired: "The driver was a conspirator?" and in answer to that question the Board's counsel replied: "Very definitely, along with Sergeant Stephanitis. He admitted that he was carrying a load overweight and overwidth and he knew what should have been done. He has testified to that". If during the colloquy between counsel and the Board, counsel for the Board meant that Edelan had testified to anything he was mistaken. The record shows that an unsuccessful effort had been made to secure the presence of Edelan at the hearing but he was not present and did not testify.

This proceeding is based on three separate complaints. The charge against Worden is that on August 11, 1958 Worden conspired with police officers

of District 7 and with personnel of Contract and Material Company, and with drivers of other trucking companies, to escort drivers of trucks of excessive weight and width along the highways of this state, between sunset and sunrise, without having a valid permit for such operation. The complaint against Barauski charged that on or about August 19, 1958, he conspired with personnel of Contracting and Material Company and knowingly permitted a truck, of excessive weight and width, to be operated on State Route 30 by James H. Edelan, without a valid permit for such operation. As to Stephanitis, the complaint charged, that on August 6, 1958, he entered into a conspiracy with other persons, to violate the overweight and overwidth statutes of this State, and in furtherance of such conspiracy, counseled with, and tried to assist John Ferrie, a truck driver for Contracting and Material Company, to move a truck of excessive weight and width over the highways of this State without having a valid permit so to do.

Upon this complaint, and the evidence found in this record, the Merit Board found that Worden, Barauski and Stephanitis "have been proven guilty of a conspiracy to violate the laws of the State of Illinois and have violated the rules and regulations of Illinois State Highway Police Force by conspiring to violate the overwidth and/or overweight statutes of the State of Illinois". The direct charge is nowhere made that Worden, Barauski and Stephanitis conspired or confederated with each other or with Ferrie, Cagney, or Edelan, to do anything. In order for a conspiracy to exist it is necessary that the same acts or conduct be engaged in or participated in by all of the conspirators. To justify the conclusion that a conspiracy existed there must be evidence of some agreement or some joint action toward accomplishing the object of the conspiracy. (People vs. Holtz, 294 Ill. 143.)

There is no competent evidence found in this record of any joint action of appellees with each other or with anyone else to accomplish the violation of the overwidth and/or overweight statutes, of this state. In order to prove a person guilty of the crime of conspiracy it is not sufficient to show a passive acquiescence on his part with the illegal act. To constitute the crime of conspiracy there must be more than one person guilty thereof and the proof must show a criminal intent between two or more persons to accomplish an unlawful result and must sustain the particular charge. (The People vs. Mader, 313 Ill. 277, 285). In the instant case the charge is that each appellee conspired with others to violate the provisions of the overweight and overwidth laws of the State of Illinois with reference to trucks operating upon the highways of this State. In order to be found guilty, ~~had~~ of this charge the proof must show that such person, so found guilty, had entered into an agreement or combination with someone, to accomplish, by concerted action, a violation of the provisions of the statute. This required a knowing cooperation on the part of appellees in the alleged illegal action.

We recognize that the acts and declarations of one conspirator during the existence of the conspiracy are competent evidence against his co-conspirators. (The People vs. Cassler, 332 Ill. 207, 218. When the fact of conspiracy is established the acts and declarations of one ~~of the others~~ co-conspirator are considered in law as the acts and declarations of the others. (The Tribune Co. vs. Thompson, 342 Ill. 503, 530). In The People vs. Halpin, 276 Ill. 363 at page 371 it is said that evidence of the acts and declarations of conspirators in the absence of their co-conspirators is admitted against the latter on the theory "that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality so far as regards the prosecution of the common design, thus rendering whatever is done or said by anyone in furtherance of the design a part of the res gestae and therefore the act of all. It is

the same principle of identity with each other that governs in regard to the acts and admissions of agents when offered in evidence against their principals and of partners against the partnership." Quoting from 3 Greenleaf on Evidence, sec. 94. In the instant case the evidence fails to establish the fact that any conspiracy existed and the testimony of Investigator Hall was inadmissible.

We are not unmindful of the rule that when testimony, altho hearsay and incompetent, if received without objection, is to be considered and given its natural probative effect as if it was in law admissible. (Town of Cicero vs. Industrial Commission, 404 Ill. 487, 495). The objections made by counsel to some of the evidence found in this record were not as specific as they should have been and some of the incompetent testimony went in without objection but ^{this} hearing was before an administrative board and the law requires the findings of such a board to be supported by convincing evidence. (Drezner v. Civil Service Commission, 398 Ill. 219.)

The evidence found in this record is not convincing and does not sustain the findings and conclusions of the State Police Merit Board. The Circuit Court, upon review of the record, properly set aside the findings and order of the Board and its judgment is, therefore, affirmed.

Judgment affirmed.

SMITH, P.J. CONCURS.

McNEAL J. CONCURS.

✓ 30, 31, 32
Abstract

5-9-6
2nd DIVISION

General No. 11458

(Abstract only)

Agenda 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
(SECOND DIVISION)
OCTOBER TERM, A. D. 1960

FILED
PAUL V. WUNDER
Clerk Appellate Court Second District

RAYMOND C. WISE,

Plaintiff-Appellant,

vs.

ETHEL HAYUNGA, as Administrator
of the Estate of Henry Hayunga,
Deceased,

Defendant-Appellee.

301A.824²⁸
Appeal from Circuit

Court of Stephenson

County, Illinois

SPIVEY--J.

A jury in Stephenson County returned a verdict in favor of the defendant, in a suit brought by Raymond C. Wise for personal injuries. Plaintiff's post trial motion seeking a new trial was denied and plaintiff appealed to this court.

This suit is the result of an auto-truck collision on September 30, 1958, on Route 50, about three and one-half miles east of Carlyle, Illinois. The uncontradicted evidence shows that Henry Hayunga, the driver of the vehicle in which the plaintiff was riding as a guest, pulled out to pass another car and collided with a truck while Hayunga was in the wrong lane of traffic. The truck was said to have been within thirty to sixty

2nd DIVISION

APPELLATE

CHICAGO, ILL.

(APPEAL FROM CIRCUIT COURT)

September 11, 1955

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

(SECOND DIVISION)

October Term, A. D. 1955

RAYMOND C. WILSON, Plaintiff-Appellant, vs. STEPHEN C. WILSON, Defendant-Appellee.

80-1-1024

Appeal from Circuit Court of Cook County, Illinois.

Case No. 52-1024

Costs, Illinois

RAYMOND C. WILSON, Plaintiff-Appellant,

vs.

vs.

STEPHEN C. WILSON, Defendant-Appellee, of the Estate of Henry Wilson, Deceased.

Defendant-Appellee.

PRIVY-1.

A jury in Stephenson County returned a verdict in favor of the defendant, in a suit brought by Raymond C. Wilson for personal injuries. Plaintiff's post trial motion seeking a new trial was denied and plaintiff appealed to this court. This suit is the result of a motor-truck collision on September 30, 1953, on Route 50, about three and one-half miles east of Caryville, Illinois. The undisputed evidence shows that Henry Wilson, the driver of the vehicle in which the plaintiff was riding as a guest, pulled out to pass another car and collided with a truck while Wilson was in the wrong lane of traffic. The truck was said to have been within thirty to sixty

feet from the car when Hayunga pulled out to pass. The highway was wet, there was a slight rain falling and Hayunga was travelling from forty to sixty miles per hour. In the collision Hayunga was killed and the plaintiff was seriously injured. The decedent's wife was named as administrator of Hayunga's estate and she is the defendant in the suit.

Plaintiff claims he is entitled to a new trial because of error of the trial court on voir dire examination. He also contends that the defendant's counsel made improper remarks in his argument, that the court erred in instructing the jury and erred in failing to take the case from the jury when both parties moved for directed verdict.

The record shows that during the questioning of the jury by the court, a juror in response to a question by the court, asked "Is there any insurance?" The court replied, "This is a suit by Mr. Wise against the estate of Henry Hayunga." The juror then asked, "But is there any insurance?" Again the court replied, "This is a suit by Mr. Wise against the estate of Henry Hayunga."

Plaintiff's counsel requested a recess at the conclusion of the court's examination of the juror and in chambers suggested that the court's answer to the juror's question left the impression that there was no insurance and moved the court to explain to the jury that an insurance company is never named in a suit and the absence of the insurance company's name in the proceedings should not be interpreted as an indication that there was or was not insurance. The court properly refused this request and suggested that if plaintiff felt that the incident would be prejudicial, plaintiff should move for a mistrial.

The entire handling of this situation was unfortunate. Surely it would have been improper for the court to have advised the jury as requested by the plaintiff. Such a statement would

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likely have created as serious an error as did the reply of the court that the suit was between Mr. Wise and the estate of Henry Hayunga.

It would have been proper and the court should have instructed the jury that the issue of insurance had no bearing on any issue in the case and the jury should refrain from any speculation, inference or discussion about insurance. This is the substance of Illinois Pattern Instruction 2.13 which has been approved by the Supreme Court. It is essential that the sword of justice cut both ways. We have countless times stated that it is improper and prejudicial to inform the jury directly or by inference that a party is insured. It is equally prejudicial to create the inference that the defendant is uninsured.

Courts long ago concluded that evidence of insurance funds available to pay a judgment may well increase a jury's assessment of damages. We are not so naive as to think that evidence of the absence of insurance would have an equal and opposite affect.

Thus in our judgment the trial commenced on an aura of falseness and unfairness inadvertently created but nonetheless prejudicial. Standing alone, the error probably was not reversible but it must be considered in light of the matters of argument which followed.

One of the first remarks made by defendant's counsel was, "Here is a man who is seriously injured, claiming a vast amount of money from an estate, and from a lady with four children." The reference to the estate was improper and in our judgment was designed to inform the jury that there was no insurance to pay any judgment returned. But this statement, was far less prejudicial than the further reference to the wife and

likely have created as serious an error as did the trial of the
jury that the suit was between M. L. and the estate of Mary
Thompson.

It would have been proper and the court would have an-
nounced the jury that the estate of Thompson was to receive an
amount of money from the estate and the jury should return their verdict
thereon, without an instruction about the estate. This is the
substance of Illinois Pattern Instruction No. 13, which has been
approved by the Supreme Court. It is essential that the words
of Justice are not used. We have concluded that the words
in the proper and official form of the jury should be
instructed that a party is interested. It is equally essential to
state the interest that the defendant is interested in.

Consequently, we conclude that the evidence of interest
is sufficient to put a question as to whether a party's
interest in the estate is not as large as the estate itself
and the estate of the estate would have an equal and
opposite effect.

That is our present the trial court's error as to the
evidence and the estate's interest is not a consideration
of the estate. Standing alone, the error probably was not revers-
ible but it was a consideration in light of the weight of the
evidence which it was.

One of the first reasons why a defendant's interest
was "less than a half" is certainly a question of fact
amount of money from the estate, and from a jury with four
members. The evidence as to the estate was undisputed and is
undisputed was designed to induce the jury that there was no
evidence to put any doubt on the estate. But this statement, was
not intended to induce the jury to return to the estate and

four children. The estate was at least a party to the litigation but the wife and four children individually had no connection whatsoever with the litigation and were under no possible legal obligation under the pleadings. Counsel for the defendant could not be so misinformed on the law that the reference to the wife and children's responsibility was other than designedly made.

We would not hesitate to reverse a verdict for a plaintiff based on an argument referring to a wife and four children where such an argument was made only for the purpose of enhancing damages.

In McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 N.E. 957, our Supreme Court said, "The statement to the jury that the appellee had a wife and five children was manifestly improper. Its only object could have been to enhance the damages by getting before the jury, in this improper and unprofessional manner, facts calculated to arouse their sympathy, which counsel knew could not in any legitimate way be brought to their attention."

These tactics are condemned in Deel v. Helligenstein, 244 Ill. 239, 91 N.E. 429. "In his closing argument to the jury, counsel for appellee made the following statement: 'I do not claim any credit for representing here the cause of a weak woman or of an infant child; that is simply my duty.' * * * This conduct of counsel is complained of, and it is insisted that it was so prejudicial to the rights of appellant that the judgment should be reversed. The language used was highly improper, and was only calculated to arouse the passions and prejudices of the jury. The conduct of counsel in thus overstepping the bounds of propriety and violating the well defined rules of procedure cannot be too severely condemned."

If the scales of justice are to balance and the sword of justice to cut both ways, as they surely must, then we cannot countenance such a flagrant abuse. But this was not all that defendant's counsel had to say on this subject.

Later he stated, "It is money they are after, money from this estate." The court overruled the objection and stated, "I will overrule the objection. Counsel can proceed on that line if he wants to or not." Thus the serious error of the argument was compounded by the apparent approval of the trial court. As was said in Good v. Grieson, 324 Ill. App. 123, 57 N.E. 2d. 514, In discussing the failure of the trial court to sustain objections to improper argument, "in the instant case, the adverse ruling of the trial court tended only to increase its effect upon the jury."

Defendant's counsel also attacked the honesty and motives of plaintiff and his attorney in his argument. He stated, "It is bad when people in a traffic like this get the smell of trying to get some money." Plaintiff's counsel properly objected to this unfounded and unprovoked remark but the court merely ordered that counsel for defendant 'proceed'."

Great latitude is properly allowed an attorney in his argument of a cause. Defendant calls our attention to the case of Commonwealth Electric Co. v. Rose, 214 Ill. 545, 73 N.E. 780, where the court said, "Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. 'He may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses.' * * *. It has been said: 'Just and fierce invective, when based upon the facts in evidence and all legitimate inferences therefrom, is not dis- countenanced by the courts.'"

The guided safeguard of this language, however, is that the argument must be based on evidence. In this case there is no evidence that either plaintiff or his counsel were engaged in a

[illegible]

"traffic", to get money. The word "traffic" has an evil connotation. It is defined as a prostitution of talents, offices or services for reward, and infers a willingness to be influenced by bribery and corrupt measures. The remark was improper, ill chosen and unsupported. In the absence of evidence supporting this charge of "traffic" to get money or to warrant the serious attack upon the integrity of plaintiff and his attorney, this statement is prejudicial. Stanton v. Chicago City Ry. Co., 188 Ill. App. 502, (abs't.).

On another occasion in the argument, defendant argued to the jury that their verdict was important not just in the instant case but because a verdict for the plaintiff would put the public in the position of being sued for \$50,000 if in their kindness they offered another a ride. Again the court failed to correct the error and sustain the objection but ordered the defendant to "proceed." This form of argument was clearly improper. The issues in the cause touched only the plaintiff and defendant and such appeals to prejudice and passion have no place in the trial of a cause. There was no evidence in the cause on this subject nor could there lawfully have been any.

There was further impropriety in defendant's argument. When speaking of the decedent, defendant's counsel said, "Do you think he was conscious of what he was doing? Do you think he just didn't give a damn?" In Rhoden v. Peoria Creamery Co., 278 Ill. App. 452, this court said, "We do not think the use of the word damn was necessary in this argument. There is certainly some other word in our language almost, if not quite, as expressive of the thought desired to be conveyed and upon another trial, counsel will refrain from violating the proprieties of his profession." The use of such language in the trial of a cause cannot but cause

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the dignity of the judicial system to suffer. At a time when the bench and bar are working as never before to create an awareness of the tremendous responsibility of our judicial system language such as this is not to be tolerated.

The trial of this cause commenced under circumstances tending to indicate that the defendant was uninsured. From a review of the arguments, it appears to us that there was a conscious attempt on the part of the defendant's counsel in his argument to take advantage of this inference by reference to the estate, the wife and children (two of whom were adults), and a supposed danger to the public of the jury returned a verdict in favor of the plaintiff.

"The general rule is that where the record shows a design or purpose on the part of counsel to improperly inform the jury that the defendant is insured or that an insurance company is defending the case and the circumstances tend to show a prejudicial effect upon the jury, the conduct constitutes error." Dinger v. Rudow, 13 Ill. App. 2d. 444, 142 N.E. 2d. 128. Here the design and purpose was to inform the jury that the defendant was not insured when in fact she was. Neither party should have such an advantage.

Defendant argues that not one of plaintiff's objections to argument were sustained and claims this as showing that defendant's argument was proper. We think that the opposite is indicated. It should be obvious that many objections should have been sustained. The error is all the greater by failure of the court to control defendant's argument.

It is also contended and it is true that plaintiff failed to object to portions of defendant's argument. Ordinarily we will not consider claimed improprieties in argument unless the trial court was given an opportunity to rule upon

the right of the judicial system to alter. At a time when the
bench and bar are working as never before to create an awareness
of the true and responsibility of our judicial system, it is
such as this is not to be tolerated.

The trial of this case commenced under circumstances
tending to indicate that the defendant was unimpaired. From a
review of the evidence, it appears to me that there was a con-
scious attempt on the part of the defendant's counsel in his
argument to take advantage of this evidence by reference to the
estate, the wife and children (two of whom were adults), and a
supposed danger to the health of the jury (which was averted in
favor of the plaintiff).

The general rule is that where the record shows a
design or purpose on the part of counsel to improperly inform
the jury that the defendant is insured or that he has some
company, is defendant the case and the circumstances tend to show
a prejudicial effect upon the jury, the court constitutes
error. Cliff v. Fidelity, 11 Ill. App. 2d 441, 125 Ill. App.
Here the design and purpose was to inform the jury that the
defendant was not insured when in fact she was. Whether such
should have been an advantage.

Defendant argues that not one of plaintiff's objections
to argument were sustained and claims that in showing that the
defendant's argument was proper. We think that the opposite is
indicated. It should be obvious that many objections should have
been sustained. The error is all the greater by failure of the
court to control defendant's argument.

It is also contended that it is true that plaintiff
tried to object to portions of defendant's argument. Unden-
iably we will not consider alleged improprieties in argument
unless the trial court was given an opportunity to rule upon

the argument by means of an objection made in proper time.

Smith v. Illinois Valley Ice Cream Co., 20 Ill. App. 2d. 312, 156 N.E. 2d. 361. Counsel should not seek to cast upon the trial court the burden of making the record. The exception to this rule is stated in City of Chicago v. Pridemore, 12 Ill. 2d. 447, 1477 N.E. 2d. 54. There the court said, "If the prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial processes stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon."

The same position is asserted in Belfield v. Coop, 8 Ill. 2d. 293, 134 N.E. 2d. 249. The court said, "So much of this argument was prejudicial and unwarranted that a duty devolved upon the court to inject itself into the proceedings sufficiently to see that the litigants received a fair trial. It is always the duty of a trial court to control the proceedings to the extent necessary to insure this result."

In Good v. Grissom, 324 Ill. App. 123, 57 N.E. 2d. 514, the court said, "It becomes necessary at times for the trial court, with or without objection by counsel, and upon occasions, for courts of review, to prevent injustice being done to either party by unjust and unfair arguments tending to unduly arouse the emotions and prejudices of the jury.

We are of the opinion that defendant's argument constituted prejudicial and reversible error.

Plaintiff also contended that instruction number nine offered by the defendant was erroneous, as omitting an essential element in the definition of wilful and wanton misconduct. It would serve no purpose to incorporate the instruction in this

the argument by means of an objection made in proper time.
Wright v. Illinois Valley Ice Cream Co., 20 Ill. App. 2d, 129
N.E. 2d, 361. Counsel should not seek to cast upon the trial
court the burden of making the record. The exception to this
rule is stated in City of Chicago v. Bridgeway, 12 Ill. 2d, 177,
147 N.E. 2d, 54. There the court said, "If the prejudicial
statements are made without objection, or without an informed
of the trial court to the extent that the parties themselves cannot
receive a fair trial and the judicial process itself is
deteriorated, then upon review this court will consider such
assignments of error, even though no objection was made and no
motion made or preserved thereon."
The same position is asserted in Callahan v. Brown, 8
Ill. 2d, 252, 131 N.E. 2d, 349. The court said, "An objection of this
argument was prejudicial and substantial and a fair trial
upon the court to determine if the proceedings were substantially
to see that the litigation received a fair trial. It is always
the duty of a trial court to control the proceedings to the extent
necessary to insure a fair result."
In Good v. Gibson, 211 Ill. App. 123, 27 N.E. 2d, 116,
the court said, "It became necessary at times for the trial court,
with or without objection by counsel, and upon occasion, for
counts of review, to prevent matters from going to either party
by unjust and unfair remarks tending to unfairly bias the
questions and propriety of the jury."
We are of the opinion that defendant's argument con-
stituted prejudicial and reversible error.
Plaintiff also contended that instruction number 11
offered by the defendant was erroneous, as omitting an essential
element in the definition of willful and intentional misconduct. It
would serve no purpose to incorporate the instruction in this

opinion since Supreme Court Rule 25-1 will require that Illinois Pattern Instruction 14.01 be offered on retrial. An examination of defendant's instruction nine, however, discloses that the instruction was misleading and should not have been given. Whereas, Illinois Pattern Instruction 14.01 makes it clear that a wilful and wanton act need not be an intentional wrong but rather, may be the result of indifference to a person's safety. Defendant's instruction number nine may well have been understood to require an intentional disregard for the safety of others.

Defendant's counsel argued at great length that the decedent had no intention to injury and so was not guilty of wilful and wanton misconduct. The giving of instruction number nine was also erroneous.

Finally, plaintiff contends that the court should have taken the case from the jury when both parties moved for a directed verdict at the close of all the evidence. There is no merit to this contention. Wolf v. Chicago Sign Painting Co., 233 Ill. 501, 84 N.E. 614.

We believe that substantial justice requires a retrial of this cause because of the prejudicial argument of defendant's counsel and the error in giving defendant's instruction number nine and the other errors not prejudicial in themselves. The judgment of the Circuit Court of Stephenson County is reversed and the cause remanded for a new trial.

Reversed and remanded.

Crow P.J. and Wright J. Concur

appeal since Supreme Court Rule 23-1 will require that Illinois
Federal District Court Rule 23-1 be filed on appeal. An examination
of defendant's testimony and, however, disclosure that the in-
formation was available and should not have been given. Therefore,
Illinois Federal District Court Rule 23-1 would appear that a witness
and witness not only not be an intentional act, but rather, was
be the result of inadvertence to a person's belief. Defendant's
testimony under the law will have been disclosed to require
an intentional attempt to the belief of others.

Defendant's conduct should be taken into account and
disclosed and is intended to injure and is not guilty of
willful and wanton misconduct. The giving of information under
these was also intentional.

Finally, plaintiff contends that the court should find
that the case that the jury was asked to decide for a dismissal
verdict at the close of the evidence. There is no need to
this contention. Walt v. Chicago and North Western Ry. Co., 233 Ill. 2d,
44 W.2d 514.

It follows that defendant's failure to produce a witness
of this cause because of the prejudicial influence of defendant's
conduct and the jury in giving defendant's testimony under
these and the other errors not prejudicial to defendant. The
judgment of the District Court of the Southern District is reversed
and the cause remanded for a new trial.

Reversed and remanded.

Crow F.J. and Wright J. Concur

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A.D. 1961

VILLAGE OF BENSENVILLE,
a municipal corporation;

Plaintiff,

and

ARTHUR BLY and VIVIAN BLY, his wife,
and ALFRED L. MENNELL and HELEN
MENNELL, his wife,

Intervening Petitioners, Appellants,

vs.

COUNTY OF DU PAGE, a body politic and
corporate, and ALVIN F. SCHMIDT, SR.
and HAZEL M. SCHMIDT, his wife,

Defendants-Appellees.

Appeal from the

Circuit Court,

DuPage County.

30 LA 324²⁵

McNEAL, J. --

The defendant, County of DuPage, rezoned certain property in unincorporated territory contiguous to the Village of Bensenville and granted a special use permit allowing the operation of a trailer park on the property by its owners, defendants Alvin F. and Hazel M. Schmidt. The village filed a complaint for a declaratory judgment that the rezoning and special use provisions of the DuPage County Zoning Ordinance were invalid, illegal and unconstitutional. A motion to dismiss the complaint was sustained, and the village was granted leave to file an amended complaint, which it did. Defendants then filed a motion to dismiss the amended complaint, and Arthur and Vivian Bly and Alfred L. and Helen Mennell, owners of property in vicinity of the Schmidt property, sought leave to intervene. The court denied leave to intervene and a final order dismissing the amended complaint was entered. To reverse this order and the intervening petitioners appeal.

According to exhibits attached to the village's amended complaint, the Schmidt property was located on the north side of Irving Park Boulevard about 400 feet west of York Road. These exhibits also recite that a public hearing was held in the Addison Fire Station on June 25, 1959, before the Zoning Board of Appeals; that notice of said hearing was duly given; and that the Zoning Board of Appeals and the Board of Supervisors of DuPage County found that this property was used for trailer park purposes prior to the adoption of the original county zoning ordinance in 1935, that prior to May, 1957, the entire tract was in an area zoned for business in which trailer parks were a permitted use, that under the general amendments of May, 1957, only the south 200 feet was zoned for business, and the north portion of the property was zoned residential, that in granting Schmidts' request for rezoning to service district and for a special use permit allowing operation of a trailer park, an apparent error in the general amendments of May, 1957 will be corrected, and that such action would in no way affect the interests of adjacent and adjoining property owners adversely and that the use would be entirely in accord with the character and trend of development in the area. The Board of Supervisors concurred in the recommendation of the Zoning Board, rezoned the property to service district, and granted the special use permit requested.

In its complaint the village alleged: that the County Zoning Act does not empower a county to grant special use permits; that the DuPage County Zoning Ordinance provides no criteria by which the county board might determine whether or not a special use permit should be issued; that the ordinance provides that no variation in the provisions of the ordinance shall be recommended in connection with special use permits unless the zoning board finds that such special use will not impair an adequate supply of light and air or increase the hazard of fire to adjacent property, diminish the value of land and buildings in the county, increase traffic congestion hazards, nor impair the health, safety, comfort, morals or general welfare of the county.

the recommendation of the zoning board was invalid because no such findings were made, the meetings of the board were not open to the public, no minutes of the board's proceedings were kept, and members of the board who were not present when evidence was taken, voted favorably on the recommendation; and that the purported amendment of the ordinance rezoning the property was invalid and unconstitutional because such amendment was by resolution rather than by ordinance. Plaintiff prayed that the court declare the meetings and recommendation of the zoning board ineffectual and the special use provisions and the amendment of the zoning ordinance illegal and unconstitutional, and that an injunction issue restraining the county and the Schmidts from devoting the property to any use under the Service District Classification or under the special use permit.

Defendants Schmidt and DuPage County filed motions to dismiss on the ground that the village has no power or authority to conduct a proceedings such as that set forth in the complaint. Their motions to dismiss the amended complaint allege that the village is not a proper party plaintiff, that the same question was passed upon in dismissal of the original complaint, and that the amended complaint contains nothing new with respect to plaintiff's right to bring the action. Accordingly the primary question on this appeal is whether or not the Village of Bensenville has power to attack rezoning by the County of DuPage of premises in unincorporated territory contiguous to the village.

The Village of Bensenville concedes that the General Assembly has not expressly granted municipalities the right to attack the rezoning of land in unincorporated territory, but it contends that its right to attack the rezoning of such land contiguous to its boundary is derived from one or more of sixteen provisions of the Revised Cities and Villages Act, viz.: sections 8-1, 8-2, 8-5, 23-73, 23-74, 23-81, 23-88, 23-105, 40-9, 53-2, 60-2, 62-2, 72-1, 74-2, 75-3 and 78-1 (Ch. 24, Ill. Rev. Stat. 1959). Some of these sections confer extra-territorial powers

upon municipalities for various purposes, but none of them contains any reference to zoning beyond the corporate limits.

Since municipalities have no inherent power and derive all of their powers from the legislature, statutes granting powers to municipal corporations are strictly construed, and any fair and reasonable doubt as to the existence of power must be resolved against the municipality. *Barnard & Miller v. City of Chicago*, 316 Ill. 519, 522. Powers delegated by the legislature are to be exercised within the corporate boundaries, and a municipality has no extra-territorial jurisdiction except insofar as it is expressly or impliedly delegated by statute. *City of Rockford v. Hey*, 366 Ill. 526, 533. It is a fundamental principle of statutory construction embodied in the maxim "expressio unius exclusio alterius" that the mention or enumeration of one or more certain things or modes of action in a statute excludes all other things or modes of action not mentioned in the statute. 34 ILP 105, Statutes par. 119. Applying these rules of construction to the sections of the Cities and Villages Act cited, it is clear that the enumeration of specific grants of extra-territorial power to municipalities for certain purposes excludes a grant of such power in connection with zoning or for any other purpose not mentioned in said sections of the Act.

The village also contends that its right to attack the rezoning of land contiguous to its boundary is recognized by section 1 of "An Act in relation to county zoning", approved June 28, 1935 (Par. 3151, Ch. 34 Ill. Rev. Stat. 1959), because that section provides that nothing in the County Zoning Act shall be construed to restrict the powers granted by statute to cities, villages and incorporated towns as to territory contiguous to but outside of the limits of such cities, villages and incorporated towns, and by section 5 of that Act (Par. 3158, Ch. 34 Ill. Rev. Stat. 1959), because that section requires a favorable vote of three-fourths of all members of the county board on the passage of an amendment to its zoning ordinance whenever the corporate authorities of the nearest adjacent zoned municipality within

one mile and one-half of the land affected, file a written protest against such amendment. There is no allegation that any written protest against the amendment was filed, and none that the amendment was not passed by more than three-fourths of the members of the county board. Applying section 1 to the municipal corporate parties in this proceedings, that section merely provides that in exercising its power to zone areas within its jurisdiction DuPage County may not impair the specific extra-territorial powers expressly granted to the Village of Bensenville under the Cities and Villages Act. Neither section 1 nor section 5 affords any recognition that the Village of Bensenville has any power to zone property, or to attack zoning of property by DuPage County, outside the corporate limits of the village.

Except for any impairment of the specific extra-territorial powers of cities, villages or incorporated towns mentioned, section 1 of the County Zoning Act cited above expressly granted DuPage County power to zone the entire county outside the limits of such cities, villages and incorporated towns, and DuPage County has exercised the power granted by its adoption of a county zoning ordinance. At best the Village of Bensenville claims power to zone territory outside its boundaries, by virtue of sixteen extra-territorial powers granted for a variety of purposes, none of which includes zoning. There is no indication that the village prior to this action ever undertook to exercise any power with reference to zoning outside its limits. Two municipal corporations cannot have jurisdiction and control, at one time, of the same territory for the same purpose. *The People v. Bartholf*, 388 Ill. 445, 463. As between the county's exercise of power expressly granted by the legislature, and the village's claim of right to exercise the same power derived or implied from powers granted the village for other purposes, we conclude that the county's authority was paramount to that of the village, and the allegations in the village's amended complaint showed no power to zone, and no authority to attack zoning of property by DuPage County, outside the village boundaries.

In their brief the individual appellants, Bly and Mennell, aver that their right to intervene was unconditional under the provisions of section 26.1 of the Civil Practice Act for the reason that "their interest would be inadequately represented in the litigation." According to their abstract, however, they represented to the trial court: "that they own property immediately adjoining, adjacent to, or in the vicinity of the property owned by the individual defendants herein; that the contemplated rezoning of said defendants' property adversely affects the rights of the petitioners and is detrimental to the value of their property, is unreasonable, capricious, arbitrary, and deprives them of their property without the process of law; and is not related in any way to conserve health, public welfare, and safety", and therefore they asked leave to intervene as plaintiffs and to file instantaner an amended complaint. As abstracted, their application for right to intervene was not accompanied by the amended complaint which they proposed to file, nor is any such amended complaint shown by the record.

In *Felertag v. Reichman*, 21 Ill. App. 2d 215, the Court said: "The arguments of both appellant and appellees center around sec. 26.1 (1) (b) of the Civil Practice Act (ch. 110, Ill. Rev. Stats. 1957), which states: '(1) Upon timely application anyone shall be permitted as of right to intervene in an action: * * * (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by a judgment, decree or order in the action; * * *.' The appellant insists that ^{it was} her right to intervene and that the court was without discretion. The right to intervene under this section is not unqualified; all provisions of sec. 26.1 must be met. * * * Par. (5) of sec. 26.1 provides: 'A person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he proposes to file.' This paragraph codified the practice in our courts prior to the adoption of the Civil Practice Act. * * * The record shows that no

pleading or motion accompanied the petition to intervene. * * * The appellant did not comply with necessary requirements of sec. 26.1 and the court was correct in denying her petition;"

Section 26.1 also required the individual appellants in the instant case to show that they will or may be bound by a judgment, decree or order in the action between the original parties and to set forth the factual grounds for intervention. Obviously, their elastic conclusion that they own property immediately adjoining, adjacent to, or in the vicinity of the property owned by the Schmidts showed no certainty that they would suffer special damage different from that of the general public. (Cf. Garner v. County of DuPage, 8 Ill. 2d 155, 158.) Also, whether or not these individual appellants were inhabitants of the village, or how they were inadequately represented, or if in fact there was any attempted representation of their interests by the village, does not appear. As abstracted, however, their grounds for intervention and attack upon the rezoning of the Schmidt property were different in many respects from those presented by the village's amended complaint. By reason of their failure to show that they would or could be bound by a judgment, decree or order in the action, and to present a petition accompanied by their initial pleading, petitioners had no right to intervene in this proceedings.

The order of the Circuit Court of DuPage County denying the individual appellants leave to intervene and dismissing the amended complaint of the Village of Bensenville was proper, and it is affirmed.

Affirmed.

Smith, P. J., and Dove, J., Concur.

Abstract

No. 11484

Publish Abstract Only

Agenda 13

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT., SECOND DIVISION
FEBRUARY TERM, A.D. 1961

ROBERT M. SHIPLEY and LILLIAN M.
SHIPLEY, his wife; ROBERT J.
KITZINGER and VIOLET KITZINGER,
his wife; RICHARD H. LUCKOW and
ROSE M. LUCKOW, his wife; CARL
J. BRAUN and MARIE BRAUN, his
wife; MARSHALL GORDON and SHIRLEY
GORDON, his wife; WOLFGANG H.
MUELLER and CAROL MUELLER, his
wife; HERMAN H. WEIG and WILMA
WEIG, his wife; DONALD C. WILSON
and DOROTHY WILSON, his wife; and
HARRY A. SEMAN and LORETTA E.
SEMAN,

Plaintiffs-Appellees,

vs.

OAK PARK TRUST AND SAVINGS BANK,
an Illinois Banking Corporation,
AS TRUSTEE UNDER TRUST NO. 3296,
and GEORGE WALLACH, doing business
as WALLACH BUILDERS,

Defendants-Appellants.)

FILED

APR 28 1961

PAUL V. WUNDER
Clerk, Appellate Court Second District

Appeal from the
Circuit Court of
DuPage County.

WRIGHT -- J.

This is a suit for injunction to enforce a private

restriction contained in the original sub-division plat of 53 Trails Estates Unit Number One in DuPage County, Illinois. The plaintiffs in this action are some of the owners of homes in the plated^r sub-division and the defendant, Wallach Builders, is the builder and beneficiary of a land trust with the Oak Park Trust and Savings Bank. Defendants filed a motion for summary judgment and the plaintiffs counter-moved for a summary judgment. The trial court denied defendants' motion and entered a decree granting plaintiffs' motion and permanently enjoined defendants from constructing on Lot 2 in the sub-division a building in violation of the restriction in dispute. From this decree, defendants appeal.

The original sub-division plat was recorded on May 20, 1955, in the Recorder's Office of DuPage County, Illinois, and set forth certain restrictions on the properties in the sub-division. The restriction in dispute is as follows: "The main residence building, exclusive of garage and breeze-way or porch, shall have a minimum ground floor area of 1200 square feet." Defendants' contend the decree should be reversed because (1) The restriction limiting the main residence ground floor area to 1200 feet is ambiguous, doubtful, unreasonable and against public policy. (2) The defendants' two story house contains more square feet of living area than the minimum required by the restriction and,

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

2. The second is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

3. The third is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

4. The fourth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

5. The fifth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

6. The sixth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

7. The seventh is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

8. The eighth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

9. The ninth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

10. The tenth is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it is prepared to accept the Commission's findings and recommendations.

therefore, such restriction materially impairs the defendants' legitimate use of their property and is invalid. (3) The plaintiffs have waived, abandoned and are estopped from insisting on the enforcement of the restriction.

In the interpretation of contracts imposing limitations and restrictions upon the use of property, doubts are to be resolved against the limitation or restriction, but where the intent is clearly manifested by the language used in the contract in view of the situation and circumstances, the restriction is uniformly enforced. *Wolf v. Schwill*, 289 Ill. 190, 124 N. E. 389. We cannot agree with the contention of the defendants that the restriction here in question is ambiguous and doubtful. The restriction is clear, concise and understandable. The only interpretation that can be given to the language used in the restriction is that the main residence building must have a ground floor area of 1200 square feet. The entire dwelling area or the group of rooms constituting the entire building area, are not entitled to be considered when formulating a minimum square foot area under the restriction as contended by the defendant. It does not include any area other than the ground floor area.

The owner of real estate has a right to convey it subject to any restriction he may see fit to impose so long as such restriction is not contrary to public policy and is not in

[illegible]

restraint of trade. *Brandenburg v. Country Club Building Corporation*, 332 Ill. 136, 163 N. E. 440. In our opinion, the restriction here under consideration is not against public policy; is not in restraint of trade and does not materially impair the enjoyment of the estate. A restriction as to ground floor area is no more an impairment than one providing that a lot be used for residential purposes or one providing for a set-back line. Such restrictions have been generally upheld and enforced by our courts. The plaintiffs, who are owners of homes in the sub-division, allege in their complaint that their residences range in price from \$19,300.00 to \$42,000.00. It is obvious that the intention of the sub-divider was to maintain high standards for this sub-division. The restriction specifically provides a minimum of 1200 square feet of ground floor area which prevents small homes from being constructed that might decrease the value of other lots in the sub-division.

The record before us discloses that some homes have been constructed in the sub-division which are slightly under the required minimum ground floor area of 1200 square feet. The defendants contend that because of this the plaintiffs have lost their right to insist upon the enforcement of the restriction, and that the restriction has been waived and

abandoned. The question of abandonment was raised in *Henricks, et al, v. Bowles*, 20 Ill. App. 2d 148, 155 N. E. 2d 664, and in *Punzak v. De Lano*, 11 Ill. 2d 117, 142 N. E. 2d 64, and in each instance the court found that slight variations of a restriction would not amount to an abandonment. Our courts have held that a showing of one or two violations in a subdivision does not create such a general break down of the covenant as to deprive a party of his right to insist upon its enforcement, *Henricks, et al, v. Bowles, supra.* We believe that the trial court properly found that the violations of the restriction in the instant case as to ground floor area are minor, and that the restriction has not been waived or abandoned.

A restriction on the use of property such as the one here under consideration when imposed as a part of a general plan for the benefit of all of the lots, gives to the purchaser a right in the nature of an easement which will be enforced in equity against owners of other lots so affected. *Punzak v. De Lano, supra.*, *Housing Authority of Gallatin County v. Church of God*, 401 Ill. 100, 81 N. E. 2d 500.

The evidence in the record before us fails to show that the restriction in question is ambiguous, unreasonable, against public policy or in restraint of trade or that it deprives the defendants of the legitimate use of their

[illegible][illegible]

property or that the restriction has been abandoned by plaintiffs.

For the reasons herein stated, the decree of the Circuit Court of DuPage County is affirmed.

DECREE AFFIRMED.

dmw pg.
Concurs
Spivey, J. concurs

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the 1990s, the number of people who have been infected with HIV has increased significantly. In 1990, there were approximately 1.5 million people living with HIV worldwide. By 2000, this number had risen to over 40 million, and by 2010, it was estimated to be over 35 million. The increase in the number of people living with HIV has been driven by a combination of factors, including the spread of the virus through sexual contact, blood transfusions, and mother-to-child transmission. The impact of HIV on individuals and communities is profound, as it can lead to a range of health problems, including AIDS, which is a life-threatening condition. The global burden of HIV is a major public health challenge, and it is essential that we continue to work towards finding effective ways to prevent and treat the virus.

Journal of Management Education 32(10)

CONCLUSION: The results of this study suggest that the use of a single, standardized, and validated questionnaire is a feasible and reliable method for assessing the prevalence of S. aureus carriage in the community.

67th St.
 Greenwich
 Conn.

Chen

James D. Jones

48215

JOHN GREEN, doing business as
JOHN GREEN & COMPANY,

Plaintiff-Appellee,

v.

TELETYPE CORPORATION,
a corporation,

Defendant-Appellant.)

APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

30 I.A. 344

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT:

This is a suit by a real estate broker to recover the reasonable value of services alleged to have been rendered to defendant at its "special instance and request" in the termination of a business lease. Defendant stipulated at the trial that if plaintiff was entitled to recover, judgment ought to be for \$2,362.50, an amount based on a broker's rate. After trial by the court without a jury, judgment was for plaintiff for that amount and defendant has appealed.

Defendant, in 1959, was lessee of property on Clybourn Avenue in Chicago at an annual rental of \$67,500 under a lease to expire on May 31, 1960. It knew early in 1959, having constructed a new plant in Skokie, Illinois, that it would not require the Clybourn Avenue premises after June 1, 1959. Plaintiff and defendant's agent discussed the problem of settling defendant's lease obligations late in 1958 and early in 1959. On March 11, 1959, defendant in writing made plaintiff its Exclusive Real Estate Agent "to sublet, or negotiate an assignment" of the lease of the Clybourn Avenue premises.

2.

Plaintiff did not procure a sublessee nor an assignee of the lease. Another broker, not representing the defendant, arranged the sale of the premises, however. In that transaction, defendant's lease obligations were settled on or about July 1, 1959 by defendant's officers and the owners of the Clybourn Avenue property. Plaintiff's suit is not to recover a broker's commission, but to recover the reasonable value of the services he rendered.

The theory of plaintiff's pleading is that on or about January 1, 1959 defendant verbally employed him as its agent to take whatever steps should be "necessary and feasible" in order to terminate its lease and that he performed numerous services for and on behalf of defendant under the verbal agreement. Defendant's affirmative defense is that an oral agreement, if there was one, was merged in the written agreement of March 11, 1959.

The issue, therefore, is whether there was an oral agreement under which plaintiff performed services for which he should be compensated or whether he was limited to the terms of the written contract of March 11, 1959.

We shall assume, but not decide, that plaintiff made a prima facie case of an oral agreement to render services at defendant's instance and request. However, we think the affirmative defense that any previous understanding between the parties was merged in their written agreement has been established clearly. The documentary evidence in support of the defense stands out strongly against plaintiff's case which is

3.

weakened by contrarities, improbabilities, unfavorable inferences, arising from all the evidence, and from the realities of commercial life.

Plaintiff's theory is that he was to help bring about the termination of defendant's lease and that he rendered services "looking toward the termination." It is conceded that he did not directly participate in or directly aid the settlement of the lease. Plaintiff, therefore, has the burden of proving the elements of the oral agreement and that he rendered substantial services in bringing about the result the defendant desired.

There is no dispute that Matt, defendant's agent, early in 1959, engaged plaintiff in a general way to do what he could in solving defendant's lease problem. There was no discussion of formal definite terms of time, compensation or work. Presumably, defendant was agreeable to letting plaintiff do what he could in whatever way he decided to accomplish defendant's purpose of settling its lease obligation. Although plaintiff's compensation was not then made dependent upon his directly effecting defendant's purpose, what understanding there was at that time did imply that plaintiff render services toward that end. After Matt, early in 1959, told plaintiff he was to do what he could, plaintiff inspected the premises, discussed with the owners on what terms they would be willing to free defendant from the lease and introduced several prospective purchasers to the owners. He conferred with representatives of the

4.

owners and of defendant and with defendant's lawyer. He attempted to solve the lease problem through a sale to a purchaser needing possession about the time of the expiration of the lease.

Plaintiff stated in his affidavit in support of a motion for summary judgment that these services were "important factors in creating a frame of mind" leading to the owners' sale of the property which involved the settlement of the lease. We think that this claim requires a strained interpretation of the evidence. The testimony is undenied that even as early as 1958 the owners were in the frame of mind to sell.

Plaintiff relies on the proof of these services rendered before March 11, 1959 to show that he had a separate oral agreement with defendant. We think, however, that a more reasonable inference is that the services led to the March 11th agreement. The document was prepared, in substance, by plaintiff. The agreement was not to "terminate" the lease but was confined to making plaintiff the agent to procure a sublease or assignment. Its terms were careful to protect defendant with respect to the commission it would pay. It precluded defendant's liability in the event of a sale of the building and imposed on plaintiff the "expense incidental to marketing."

It is highly improbable that plaintiff and defendant decided upon this careful agreement while simultaneously maintaining the vague oral undertaking upon which plaintiff

5.

sues here. It is improbable that defendant would bind itself under such a vague agreement to pay a broker's rate for services which need not in themselves attain the objective but merely be "looking toward" the objective.

The improbability is enhanced by plaintiff's own conduct. The written agreement was dated March 11, 1959 and stated that it "will constitute our complete understanding." May 1st, plaintiff wrote and assured defendant he was not "sacrificing your interest in our efforts to sublease." After the successful broker, Storch, inquired of defendant what it would be willing to settle its lease obligations for, Matt called plaintiff and gave him this news. Plaintiff neither demurred nor made a demand with respect to his own position. He subsequently, on June 17th, wrote defendant "in light of the terms of our Exclusive Agency dated March 11th, that any remuneration applicable to our transaction with you would be a matter of our Mutual Agreement." After learning of the sale, he continued to rely upon the March 11th agreement and did not discuss the alleged oral contract.

We are not persuaded the March 11th agreement was solely to clothe him with authority to advertise the premises. It stated it was their "complete understanding" and he previously advertised the premises several weeks without the writing. The May 1st letter is not proof of his attempt to achieve termination. Its terms refer to subleasing and it was in pursuance of the written, not the alleged oral, agreement. The relationship between defendant and Storch does not leave

6.

only the inference that the March 11th agreement was violated or abandoned and that defendant was acting under the oral agreement. There are other alternatives. Defendant could have been ignorant of any oral agreement, or confident that it had been merged in the March 11th agreement.

We think the only case cited by plaintiff, that is relevant to our decision is Close v. Browne, 230 Ill. 228 (1907). He cites it to support his claim for services rendered, even though they did not directly bring about the result. There, the plaintiff rendered service not contemplated by the written agreement between them, which plainly led to a result benefiting the defendant. The trial court in the instant case would not have been justified in finding that the defendant was benefited, in the same way as the defendant in the Close case, from the services rendered by plaintiff. It would not have been justified in finding that plaintiff rendered substantial service.

We think that the trial court erred in finding for and giving judgment for plaintiff. We find that any oral understanding between the parties was merged in the agreement of March 11th and that plaintiff's employment was to procure a sublessee for, or assignee of, defendant's lease; that defendant had no obligation to compensate plaintiff for any other work or purpose; and that any claim plaintiff may have had in connection with the settlement of defendant's lease obligation was necessarily limited to the March 11th agreement. Plaintiff disclaims any right under that written

7.

agreement.

Because we think a construction opposite to that of the trial court is clearly evident on this record, we find the judgment is against the manifest weight of evidence. In re Estate of Meade, 17 Ill. App. 2d 286 (1958). Judgment is reversed and the cause is remanded with directions to dismiss plaintiff's suit and enter judgment for defendant's costs.

REVERSED AND REMANDED WITH DIRECTIONS.

BURMAN AND MURPHY, JJ. CONCUR.

PUBLISH ABSTRACT ONLY.

48283

VERNIE ANDERSON,)
Plaintiff-Appellee,) APPEAL FROM THE
vs.) SUPERIOR COURT,
HELMA ANDERSON,) COOK COUNTY
Defendant-Appellant.)

301A.2d.345

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decretal order denying her motion to vacate a divorce decree obtained after service by publication of notice in the Chicago Daily Law Bulletin and by mail.

The parties were married on July 5, 1917, at Chicago, Illinois, and were separated on April 15, 1932. The child born of the marriage is now forty years of age.

Plaintiff filed for divorce on grounds of desertion and submitted an affidavit of defendant's non-residence. The affidavit states that defendant resides or has gone out of state and on due inquiry cannot be found, so that process cannot be served upon her; that upon due inquiry her place of residence cannot be ascertained; and that her last known place of residence was 10502 S. Longwood Drive, Chicago. Notice of the pending action was published in the Chicago Daily Law Bulletin and a copy of the notice was mailed to the Longwood Drive address. The affidavit and notice were in compliance with Ill. Rev. Stat. Ch. 110, §14 (1957), which provides for service of process by publication. Defendant did not appear, and on March 12, 1958, a decree was entered granting the divorce and reciting that due notice of the pendency of the suit was made by publication according to the statute.

One year later defendant moved to vacate the decree. Her amended petition stated that she resided at 508 W. Englewood Avenue, Chicago, when the divorce action was filed; that she maintained a permanent residence there "even while she was employed" at the Longwood Drive address; that plaintiff visited her at the Englewood address and knew that she lived there; that she never received notice of the divorce suit; and that she had a good and meritorious defense in that plaintiff deserted her. She therefore prayed that the divorce be set aside.

Plaintiff's answer to the amended petition stated that service was made by publication after an attempted personal service by the Sheriff failed because defendant had recently moved from the Longwood Drive address; that defendant was attempting to conceal her whereabouts within the state so that process could not be served upon her; and that the only reason defendant failed to receive the notice mailed her was that she failed to leave a forwarding address.

The court entered an order on June 7, 1960, reciting: that the matter came on for hearing on the amended petition and answer, that the court heard testimony of witnesses and arguments of counsel and was fully advised in the premises, and that the motion to vacate was denied. No transcript of evidence has been presented to us on this appeal.

Defendant contends that plaintiff's answer to her petition is at variance with his affidavit of non-residence since his answer states that she was trying to conceal herself within the state, while

his affidavit states that she resides or has gone out of the state.

On its face, the affidavit complied with the statute, and the question considered on the motion to vacate was primarily whether the facts stated in the affidavit were true. We think the statement in the answer that defendant was concealing herself within the state was plaintiff's way of denying by answer that he visited the defendant at the Englewood address and knew she could be personally served there, and therefore we find that this statement is not in variance with nor contradictory of the affidavit.

Defendant also contends that plaintiff in his answer did not deny her allegations that he visited her at the Englewood address where she alleged she resided at the time this suit was commenced and therefore admits them. Defendant's argument here is, in effect, that the motion to vacate should have been granted on the pleadings; that her amended petition stated good cause to vacate, and that plaintiff's answer was insufficient to controvert her claims because of the admissions therein. However, it does not appear that she made any motion to strike or for judgment on the pleadings, or in any way preserved this question or brought it to the attention of the trial court. Instead, as appears from the trial court's order, the parties proceeded to a hearing on these questions, and the court denied the motion to vacate. Having taken no steps to rely on these admissions in the court below, she has waived her right to rely on them here. *Sottiaux v. Bean*, 408 Ill. 25. As we have no transcript of proceedings at this hearing, we must assume that the court acted in conformity with the law and had before it sufficient facts to properly enter the order. *Leathers v. Leathers*, 13 Ill. 2d 348; *Boyle v. Veterans Hauling Line*, 29 Ill. App. 2d 235.

"All defects in pleadings, either in form or substance, not objected to in the trial court are waived." Ill. Rev. Stat. Ch. 110, §42(3) (1959). Unless the question of the sufficiency of the pleadings is properly preserved and brought to the attention of the trial court, it may not be considered on appeal. Boyle v. Veterans Hauling Line, 29 Ill. App. 2d 235; Maierhofer v. Gerhardt, 29 Ill. App. 2d 45; Karg v. American Case Iron Pipe Co., 312 Ill. App. 573. As defendant did not do this, we must assume that the trial court found that the allegations in the petition to vacate the decree were not sustained by the evidence.

For the reasons stated above, the order of the trial court denying defendant's petition to vacate the divorce decree is affirmed.

AFFIRMED.

KILEY, P. J. AND MURPHY J. CONCUR.

ABSTRACT ONLY.

48352

A

MILES WLODEK,)	APPEAL FROM THE
)	
Plaintiff-Appellee,)	TOWN COURT OF CICERO,
)	
v.)	COOK COUNTY, ILLINOIS.
)	
ANDREW SEDLACEK,)	
)	
Defendant-Appellant.))	

2d 1

30 14 351

PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

The town court of Cicero entered judgment for plaintiff on the warrant of attorney contained in a cognovit note. Defendant petitioned the court to vacate the judgment for want of proper venue. The petition was dismissed on plaintiff's motion. Defendant appealed from the judgment and order dismissing his petition, directly to the Supreme Court of Illinois which transferred the case here.

Defendant's petition was based on ILL. REV. STAT. ch.37, § 333 (1959). The Cicero court found the section "invalid as in violation of section 29 of article 6 of the Illinois constitution" and "vague, indefinite, uncertain, unintelligible, and speculative, and ambiguous . . . in violation of section 2 of article 2 of the Illinois constitution."

The transfer of this cause from the Supreme Court removed the constitutional question from the appeal. Guttman v. Estate of Guttman, 28 Ill. App. 2d 85, 87 (1960). The sole question now is whether the town court of Cicero was the proper venue.

Section 333 deals with the jurisdiction of town courts. Our Supreme Court in The People ex rel. Norwegian-American

2.

Hospital, Inc. v. Sandusky, 21 Ill. 2d 296, 301 (1961) held: "While we may agree that the provision of the City Court Act lacks succinctness of expression, the only possible meaning of the words used is that the provisions of the general venue statutes shall be construed to give the same effect to town boundaries in relation to the venue of town courts as county boundaries have in relation to circuit courts." See also Stanley v. Gardner, No. 48172, App. Ct., First District, Mar. 13, 1961.

Under this interpretation of section 333 the town court of Cicero had no jurisdiction to enter judgment by confession because the note was not executed in Cicero, defendant did not reside there and owned no property there. ILL. REV. STAT. ch. 110, § 50(4) (1959). A judgment by confession entered without any of these elements is void. ILL. REV. STAT. ch. 110, § 8(1) (1959).

We hold that the town court of Cicero was not the proper forum for this suit and its judgment is, therefore, void. For this reason the order dismissing the petition is set aside, the judgment is vacated and the suit dismissed.

JUDGMENT VACATED AND SUIT DISMISSED.

BURMAN AND MURPHY, JJ. CONCUR.

PUBLISH ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
FEBRUARY TERM, A. D. 1961

GILBERT NYMAN,
Plaintiff-Appellant,
vs.
LEROY BARBER,
Defendant-Appellee.

Appeal from the
Circuit Court of
Bureau County.

CROW, F. J.

The plaintiff-appellant, Gilbert Nyman, a member of the Carpenters' Union, Princeton Local No. 1525, brought suit on an alleged contract against the defendant-appellee, Leroy Barber, a contractor and lumber yard operator, doing business as Barber Lumber Company, to collect the union scale of wages provided therein for work performed at the defendant's request. The contract in question purports to have been made, in the first instance, by and between the Illinois Valley District Council of Carpenters, an association of several local carpenter's unions, which included the Princeton Local, and the Illinois Valley Contractors Association, an association of local contractors, of which the defendant was evidently not a member. The copy of the contract in evidence here bears a date of April 11, 1956 and purported to be effective from April 1, 1956 to April 1, 1958 and from year to year thereafter unless terminated according to the terms thereof. It was signed by

the Illinois Valley District Council of Carpenters and by the Princeton Local Union No. 1525 and several other local unions. It was not signed by the Illinois Valley Contractors Association though there is evidence that the original or some other copy had been signed by that Association. It was signed by the defendant on or about March 11, 1957. The plaintiff seeks a recovery for the difference between what he claims he should have been paid as provided for in the contract and the amount he was actually paid, and he asked to be paid for his "waiting time" as provided for in the contract, and for attorney fees for the collection of wages after service of a demand. The defendant denied all the allegations of the complaint, including those alleging he had entered into a written contract, but he set up no affirmative defense. The Court heard the case without a jury and entered a judgment for the defendant. The plaintiff appeals.

The plaintiff urges that a member of a labor union may recover damages from his employer for the violation of a provision concerning wages contained in a labor contract between the employer and the union of which the employee is a member, and that the judgment here for the defendant is contrary to the manifest weight of the evidence.

The defendant urges that the alleged contract was not validly entered into and was not a binding contract because a condition precedent had not been performed, and that the judgment is not manifestly against the weight of the evidence.

From the facts in evidence, it appears that on August 17, 1956 the plaintiff, who was not then a member of any union, went to work for the defendant as a carpenter at a wage scale

of \$2.00 per hour. Four days thereafter the defendant told the plaintiff that he would have to join the local carpenters' union, to which the defendant also belonged and continued to belong during the time concerned. The plaintiff said he was willing to join the union if he were paid the union scale which was then \$3.15 an hour. The defendant told the plaintiff he was a union contractor. The plaintiff on October 6, 1956 became a member of the Princeton Carpenters' Local Union No. 1525. He was required to and did take an oath that he would not accept less than the union scale of wages for his work. The Constitution and By-Laws of the union provided that a member (such as the defendant) could remain or become a contractor only if he paid the union scale of wages.

The plaintiff offered in evidence, and it was so admitted, the contract herein referred to, which the defendant admitted signing. The plaintiff testified that the defendant paid him part of the time at the rate of \$2.00 per hour, part of the time at the rate of \$2.47½ an hour, and part of the time at \$2.50 an hour for actual hours worked, though during part of the time the pay slips and checks indicated payment at the union scale but for a lesser number of hours than were actually worked. He also testified that the defendant paid the union scale for 3 or 4 months, and that he was employed during the period of August 7, 1956 to November 10, 1958. He said he never agreed to turn in or turned in less hours than he actually worked, and never agreed to accept less than union scale. The plaintiff had mentioned the matter of his wages to the defendant's bookkeeper and complained to a union bus-

iness representative. The matter was brought to the attention of the membership of the local union, a committee was appointed, and various meetings ensued between the business representative, the committee, and the defendant. On or about March 11, 1957 at a meeting at his place of business the defendant signed the contract herein referred to. Although the defendant did not deny signing it, he testified, in substance, that there was a certain oral condition precedent to the contract's becoming effective, or a condition subsequent upon the nonoccurrence of which the contract ceased to be effective, and that this condition was not performed, and, as a result, the contract never became binding upon the parties, or ceased to be binding. The condition he testified to was, in substance, that at the time of the execution of the contract it was orally agreed, though the contract contained no such provision, that if the defendant would sign the contract the Princeton Local and its representatives would have 30 days in which to sign up all other local non-union contractors and if they did not do so within that time the contract would be thereafter ineffective. There was some evidence, besides the defendant's testimony, of oral representations or agreements by the union as to trying to organize other local non-union contractors. The principal union business representative testified, however, that there was no restriction of that sort on the effectiveness of the contract, or any such condition, though he had indicated to and assured the defendant that the union would do its best to organize other local non-union contractors. There was evidence that an attempt was made by the union to sign up the non-union contractors but the union failed to do so. It

appears that the union scale for carpenters under the contract was \$3.15 an hour to April 1, 1957 and \$3.30 an hour after April 1, 1957.

On June 8, 1956, after the date of the contract herein concerned but before the defendant signed it, the defendant filed with the Illinois Valley District Council of Carpenters a form required by that contract relating to social security, unemployment taxes, workmen's compensation, and the number of his employees. On January 21, 1957 the defendant mailed to the Council a postcard giving his social security number. On May 27, 1958, long after the defendant had signed the contract involved, his insurance company filed with the Council a Certificate of Insurance relating to workmen's compensation and public liability insurance.

The plaintiff cites a number of cases to the effect that a member of a labor union may recover damages from his employer for the violation of a provision concerning wages contained in a labor contract between the employer and the union of which the employee is a member: Cf. NOVOSK et al. v. REZNICK et al. (1944) 323 Ill. App. 544; UNITED PROTECTIVE WORKERS OF AMERICA v. FORD MOTOR CO. (1952) 194 F. 2d 997, C.A., 7th; and DIERSCHOW v. WEST SUBURBAN DAIRIES, INC. (1934) 276 Ill. App. 355. These cases appear to sustain the plaintiff's position in principle. Indeed the defendant apparently agrees that the contract, if proven and if validly entered into, would be binding on both the plaintiff and the defendant, but argues that the invalidity thereof results because a supposed condition precedent had not been performed. The only cases the defendant cites on this are MCCLARY ADMX. v. GRAND LODGE BROTHERHOOD etc. (1935) 282 Ill. App. 77 and NATIONAL DAIRYMEN'S ASSN. INC. v. DEAN MILK CO. (1950) 183 Fed.

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

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2d 349, C. A. 7th. We have read those cases but do not believe they are authority at all upon the factual matters presented in the instant case. The contract itself here has no provision requiring the local union to do anything within 30 days, or to sign up all or any other non-union local contractors, or that if it did not so do within that time that the contract was not to be effective or to cease to be effective. Whether or not a provision in a contract, if the provision is there, constitutes a condition precedent, or subsequent, depends, of course, upon the terms of the written contract. But in this case there were no terms in the written contract regarding any such supposed condition.

Further, under the parol evidence rule, if a contract is reduced to writing, as here, the writing affords the only evidence of the terms and conditions of the contract; all antecedent and contemporary verbal agreements are merged therein; and parol evidence is not admissible to add to, take from, or change the terms as written: TELLUMIDE POWER TRANSMISSION CO. et al. v. CRANE CO. (1904) 208 Ill. 218; GREEN v. ASHLAND etc. BANK (1931) 346 Ill. 174.

We also believe that the defendant has waived any condition precedent which may have existed, if there were any competent evidence thereof, by filing an answer simply denying liability and by failing to allege in his answer any condition precedent which he claimed. In THE ANDREW LOHR BOTTLING CO. v. FERGUSON (1906) 223 Ill. 88, the Supreme Court considered the question of waiver of a claimed condition precedent in this manner. At page 93 the Court stated:

THE UNIVERSITY OF CHICAGO
 LIBRARY
 540 EAST 58TH STREET
 CHICAGO, ILL. 60637

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

"There is, however, another conclusive answer to this contention. Appellee contends, and the contention is supported by the evidence and the finding of the Appellate Court, that even if appellant's construction of this clause of the contract be granted, appellant had waived its right to raise that question by its unconditional denial of liability on other grounds. There can be no doubt of the rule that a party having a right to insist upon a condition precedent to the payment of money or other performances on his part will waive the condition precedent by a total denial of liability or by placing his refusal to perform on other grounds. This rule has often been applied to contracts of insurance; but it is a salutary and well established rule of the common law, the application of which to all contracts will effect justice and cut off subsequently discovered excuses for the violation of contract engagements."

The trial court was in error in entering a judgment for the defendant and the judgment is reversed and the cause remanded for a new trial.

REVERSED and REMANDED.

Wright, J. Concur.

Spivey J. and Wright J. concur.

1st DIVISION

Abstract

NO. 11508

Abstract

Agenda 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
MAY TERM, A.D. 1961

FILED

JUN 8 1961

PAUL V. WUNDER
Clerk Appellate Court Second District

JOHN W. SCHAEFER and
MARY ANN SCHAEFER,

Plaintiffs-Appellees,

vs.

CLEARBROOK HOMES, INC.,
an Illinois corporation,

Defendant-Appellant.

Appeal from the
Circuit Court,
Lake County.

McNEAL, J. -

The plaintiffs, John W. and Mary Ann Schaefer, recovered judgment for \$297.00 on a verdict of a jury against the defendant, Clearbrook Homes, Inc. Defendant's post trial motion for judgment notwithstanding the verdict was denied, and defendant appealed.

In their amended complaint plaintiffs alleged that on July 20, 1956, defendant sold them Lot 22 and the north 6 feet of Lot 21, in Block 2, in Arthur Dunas' Mundelein Manor, a subdivision in Lake County; that prior to and at the time of the sale, defendant orally represented to them that the property was improved with storm sewers; that plaintiffs relied upon the representation, and in reliance thereon contracted to buy the property, paid the purchase price, and accepted conveyance of the real estate; that the representation was false; that on December 23, 1957, the Village of Mundelein adopted a special assessment ordinance for storm sewers; and that plaintiffs will be required to expend a large sum of money in order to comply with the ordinance. In its answer defendant admitted the sale of the property to plaintiffs, but denied all other allegations contained in the complaint.

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IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JANUARY 1, A.D. 1901

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The evidence disclosed that the Schaefer entered into a contract with the defendant corporation on October 13, 1955, and not on July 20, 1956, as alleged. By the contract defendant agreed to build a brick veneer house according to the Veterans Administration's Master Panel 1936 on the premises described, and upon completion to convey the premises to plaintiffs for \$16,950. The house was constructed and the property was conveyed to plaintiffs. They took possession in June, 1956.

Mr. Schaefer testified that in April, 1956, he went to defendant's office located in a model home near the premises and there met Mr. Freeman, then president of the company. As they stepped outside the office, Schaefer commented on the amount of mud in the area. Mr. Freeman said: "Don't worry, the storm sewers have been a little clogged up. This particular location was owned by Sam Insull years ago and he put sewers in here for a model community for the people of Chicago." According to plaintiff's testimony, this statement was made several months after plaintiffs had executed the contract to buy the property.

The only other witness at the trial was Mr. Turk, who was Freeman's successor as president of the company. Mr. Turk identified an exhibit captioned Subdivision Information which was defendant's request made in May, 1955, to the Veterans Administration for an analysis of the subdivision and for VA advice and suggestions. This exhibit represented to the Veterans Administration that there were no storm sewers in the subdivision. There was some evidence that this exhibit was present when the contract was signed and that it is incorporated in the contract by reference.

Plaintiffs-Appellees filed no brief in this court. On this state of the record we would be justified in reversing and remanding the cause without any further discussion. 2 I.L.P. 514, Appeal and

Error par. 560; Eckells v. City Council of East St. Louis, 23 Ill. App. 2d 360, 362; Babinski v. Babinski, 20 Ill. App. 2d 336, 340. Nevertheless we have carefully examined the abstract and record in this case and find no other reference to storm sewers in the evidence. It is obvious that plaintiffs could not have been induced to make a contract in October, 1955, by means of any representation made in April, 1956, and that they could not have relied upon such representation at the time they made the contract.

Since there is no other evidence in the record to support the misrepresentation alleged, the verdict and judgment against defendant are against the manifest weight of the evidence. Accordingly the judgment of the Circuit Court of Lake County is reversed, and the cause is remanded with directions to enter judgment for defendant notwithstanding the verdict.

Reversed and remanded with directions.

SMITH, P.J., and DOVE, J., concur.

These two (two) items : 1. The Council of the City of New York, 1911.

and, 2. The Council of the City of New York, 1912.

These two items are also included in the Council of the City of New York, 1911.

These two items are also included in the Council of the City of New York, 1912.

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These two items are also included in the Council of the City of New York, 1923.

These two items are also included in the Council of the City of New York, 1924.

✓ 30 p. 418

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10343

Agenda No. 16

Dennis Henegar, individually and as
surviving husband of Pearl Henegar, and as
administrator of the estate of Pearl Henegar,
deceased,

Plaintiffs-Appellants,

vs.

Illinois Central Railroad Company, a
corporation, O. G. Cooper, Charles E.
Alspach and C. E. Kwasigroch,

Defendants-Appellees.

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)
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) Appeal from the
) Circuit Court of
) Champaign County
)
)
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)
)

ROETH, Justice.

Suit was brought by the husband individually and as adminis-
trator of the estate of Pearl Henegar for damages arising out of
her death, for ambulance, medical, hospital and funeral expenses
incurred by him on behalf of deceased, and for damages sustained
by him in the destruction of his automobile. Defendants are the
Illinois Central Railroad Company, whose train collided with the
aforesaid automobile, and the engineer, fireman and head brakeman
of said train. The case was tried before a jury and at the con-
clusion of plaintiffs' case on motion made by defendants the
court directed a verdict in favor of each of the defendants
against the plaintiffs as administrator and individually and

Added

STATE OF TEXAS
COUNTY OF DALLAS
THIS 10th day of

January, 1914

1914, I, J. M. [illegible]

being personally and lawfully
qualified to administer the
Oath of Office, do hereby certify
that the following is a true and
correct copy of the original
as the same appears on file in
the office of the County Clerk.

Witness my hand and the seal of the County of Dallas, Texas, this 10th day of January, 1914.

J. M. [illegible]

Attest my hand and the seal of the County of Dallas, Texas, this 10th day of January, 1914.

J. M. [illegible]

County Clerk

1914

This was brought by the husband, [illegible], who is a [illegible],
of the County of Dallas, Texas, for the purpose of [illegible] and to
[illegible] for [illegible], [illegible] and [illegible] [illegible]
[illegible] by him on behalf of [illegible], and the [illegible] [illegible]
by him in the [illegible] of his [illegible]. [illegible] [illegible]
[illegible] County of Dallas, Texas, [illegible] [illegible] with the
[illegible] [illegible], [illegible] [illegible] [illegible] [illegible]
of said state. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

entered judgment thereon. From this judgment plaintiffs, individually and as administrator, appeal.

As stated in Tucker v. New York, Chicago and St. L. R. R. Co., 12 Ill. App. 2d 545, 140 N.E. 2d 370, affirmed in 12 Ill. 2d 532, 147 N.E. 2d 376:

"A motion for a directed verdict should be allowed if, when all the evidence is considered, with all reasonable inferences to be drawn therefrom in its aspects most favorable to the party against whom the motion is directed, there is a total failure to prove one or more essential elements of the case." Watts v. Bacon & Van Buskirk Glass Co., 18 Ill. 2d 226, 163 N.E. 2d 425.

With this in mind the evidence below will be set out so as to raise all proper inferences in favor of the plaintiffs.

The accident herein occurred at approximately 1:25 A.M. on November 15, 1958. Decedent, who was 52 years of age, had been employed as a waitress in a bowling alley restaurant in Onarga, Illinois, some three miles north of the scene of the accident. She started work at 4:00 P.M. of the previous day and worked until closing and assisted after that in cleaning the restaurant until after 1:00 A.M. She left the restaurant at about 1:10 A.M. driving the automobile which was subsequently struck by defendant's train. She had no intoxicants to drink during or after working hours, was in a cheerful, happy mood, and did not appear to be tired or sleepy. In short, all her faculties appeared to be functioning normally. She was a good, careful and conscientious driver and

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From this it can be seen that the model is not a good fit for the data.

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1. *Journal of the American Medical Association*, 1991; 265: 1000-1001.

[illegible]

Illinois, even more so than north of the state of the world.

10/11/2011 10:11:11 AM

Along the south side of the road, there is a small, rectangular, concrete structure, which is approximately 10 feet long and 4 feet wide. It appears to be a small, open-sided structure, possibly a shelter or a small building. It is located on the right side of the road, near the intersection with the road leading to the school.

There are no essential "top" words, and the only words to be listed

the typical qualitative and quantitative differences between the two groups.

had been for many years. Several witnesses who had observed her drive or had driven with her so testified. After leaving the restaurant her employers got into their automobile and testified that they watched her get into the automobile of her husband alone and both vehicles proceeded down Route 45 with the decedent following her employers. It was especially foggy and raining very hard. There was nothing unusual about the manner in which the decedent walked, talked or drove at that time. The last time she was seen was a few seconds after pulling away in her car from the restaurant as she proceeded south on Route 45 heading home. She had worked at this restaurant from time to time for a few years previous, travelling the same route back and forth to her home. The weather conditions were such that the windows of automobiles tended to steam up and combining with that the rain and fog limited visibility. The employers testified that they lost sight of her because of weather conditions.

In the process of going home the deceased drove south on Route 45 to the Thawville-Delrey Road, hereafter referred to as the Road, then west along the Road to her home. The railroad tracks run due south out of Onarga, parallel with and approximately 100 feet west of Route 45 and are elevated some 10 feet above the route. Route 45 and the Road intersect approximately 3 miles south of Onarga and at this point the Road is divided into three lanes.

and down for some time. Several witnesses who had observed her
drive up the street with her car testified that leaving the
restaurant her employees and two other automobiles and testified
that they observed her get into the automobile at her husband's home
and both vehicles proceeded down town to which the witness following
her movements. It was especially foggy and raining very hard.
There was nothing unusual about the scene in which the witness
witnessed, called as shown at that time. The last time she was
even was a few minutes after pulling away to her own home.
The restaurant at the present time is about 47 blocks from the
last point at this restaurant. The time is about 10:15 p.m.
usually, travelling the same route back and forth to her home.
The witness testified that when she arrived at her home
she would go up and smoking with her own car and the
last testimony. The witness testified that that day the light
of her husband's car was not visible.

In the process of going from the restaurant home street on
route 42 to the restaurant home, witness testified to see
the car, then went along the street to her home. The witness
testified that the car was of dark color, travelled with the headlights
the back seat of car 42 and the witness said to that about the
color. She said she did not believe it was a light color
of color and at this point the car is about four blocks from

West of the tracks the Road is a one-way concrete slab 10 feet in width with dirt on either side of the slab and at about the same grade level as Route 45. The right of way of the Road is 32 feet in width both on the east and the west side of the tracks, as well as over the tracks. As you proceed from the west to the east the Road goes up the incline toward the tracks of the railroad and across the tracks. The main traveled portion across the tracks has 18 foot planks lying parallel and approximately level with the top of the tracks. There are two sets of rails, one northbound on the east and one southbound on the west, and separating the east rails from the west rails is a small section which is paved with gravel. After the Road passes the tracks and proceeds east it is again paved with the paved portion being somewhat less than 18 feet. It runs in an easterly direction for about 25 yards east of the tracks and then divides into three lanes, one lane going straight ahead to abut into Route 45 at a right angle. Another lane curves to the right for traffic proceeding off the Road and south on Route 45 or coming off Route 45 from the south to proceed west on the Road. The other lane curves to the left for traffic proceeding north off the Road or for traffic coming from the north that proceeds west on the Road. The right of way of the railroad is 200 feet.

The only eye witnesses to the accident were the individual

At way of the railroad is 100 feet, coming from the north that proceeds west on the road, the right to the left for traffic proceeding north will be used as for traffic from the south of the road, the right hand road connecting all the way and north on road 41 as shown and south of right angle. Section line drawn on the right for traffic. Road, the line which contains about 100 feet more at the end than 11 yards east of the line and the line join them. Some one less than 10 feet. It runs in an easterly direction and proceeds east it is fairly heavy with the road bedded below which is covered with gravel. About one foot across the track separating the road would have the same as a small section throughout on the road and one section on the west, and with the top of the road. There are two sets of rails, one standard has 12 inch flange (type standard) and approximately level and narrow the track. The main travelled portion across the line goes up the hillside about the center of the railroad will be over the road, as you proceed from the west to the east on right hand on the road and the west side of the road, as which with the on either side of the road and at about the same way as the track the road is a narrow road and 10 feet in

defendants who did not testify. Their interrogatories were read to the jury and from them certain facts appear. It should be now noted that there is no testimony of the movement of decedent's car after it left her place of employment in Onarga. Which of the three lanes she used in leaving Route 45 to get onto the Road and proceed across the tracks is unknown. The train was heading south on the westernmost track at a speed of between 45 and 50 miles an hour. At a distance of some 1400 feet from the intersection the three individual defendants saw two red lights near the intersection of the road and tracks. When the train was about 500 feet from the crossing the defendants were able to tell by the headlight of the engine that the red lights were the tail lights of an automobile. At that point the brakes of the train were applied. The automobile was on the tracks some 5 to 50 feet south of the crossing and the train crashed into the right side of the car near the rear. From the evidence it would appear that the car, when first distinguished to be a car by the crew, was stopped on the tracks south of the planks that constituted the crossing and facing in a somewhat southwesterly direction, and astraddle the east rail of the southbound track. The left front corner of the engine made contact with the right rear of the car. When the train came to a stop about 1200 feet south of the inter-

section the automobile was impaled onto the left front of the train and was facing south. The two front tires and the right rear tire were still inflated, while the left rear was torn from the rim.

Adjacent to the south end of the planks and directly to the east of the east rail of the west tracks, defendant had a drainage ditch some 14 to 17 inches deep. The road across the tracks and the approach to the tracks is, in some degree, pitted and rough. The curved portion of the road, ostensibly used by motorists who leave Route 45 to proceed west on the Road, is banked slightly so that an automobile will lean toward the north as it makes this turn. The right of way of the railroad has power poles at intervals and there are trees along the highway as it parallels the railroad right of way so that the view of the tracks to the north is partially obstructed to motorists driving off Route 45, not only because of the poles and trees but because of the leaning of the car. However, when a motorist is at a point 25 yards from the tracks he is out of the curve and on the straightaway of the road and his view is completely unobstructed. The crossing is marked by two cross buck signs lettered "Railroad crossing, two tracks". There are no automatic signals that warn of the approach of a train. The decedent's body was found after the accident approximately 150 feet south of the crossing, on the east rail of the

section the responsibility was located near the left front of the
truck and was facing south. The two front tires and the right
rear tire were still inflated, while the left rear was completely
flat.

Witnesses to the south end of the accident and vicinity in the
area of the site all of the same people, witnesses had a statement
which said it is 11 inches wide. The road across the bridge and
the approach to the bridge is, in some places, 11 feet and 10 inches.
The current portion of the road, especially used by motorists who
leave while it is covered when on the road, is about 11 feet and
that an automobile will pass through the arch of it while this car.
The right of way of the railroad has power poles at intervals and
there are trees along the highway as it parallels the railroad.
Right of way so that the side of the tracks to the north is completely
operated to separate driving off from the left hand
of the police and there are several of the houses of the city.
However, when a witness is at a point 10 feet from the tracks
he is out of the curve and on the straightaway to the east and
his view is completely unobstructed. The crossing is marked by
two cross back signs (white) (white) (white) (white) (white) (white).
There are no automatic signals that warn of the approach of a
train. The defendant's body was found after the accident, however,
barely 150 feet south of the crossing, on the east side of the

northbound track. A portion of the decedent's bridge plate and her earrings were found approximately 50 to 75 feet from the south edge of the planks that made the crossing.

It would appear that the most logical and favorable inference to the plaintiffs to be made from the evidence was that the decedent's automobile was stopped on the track, that it drove off the planking or graveled portion of the road and was stuck, about 5 feet south of the planks when defendant's train was at least 1400 feet from the crossing. However, we will consider all possibilities in our review of this evidence.

Plaintiffs' theory is that there is ample evidence from which the jury could have found that the railroad maintained an ultra hazardous crossing; that it did not give proper warning for such crossing or of the approach of its train and that it failed to keep a proper lookout for vehicles approaching the crossing; that the individual defendants did not exercise proper care especially in regard to lookout to prevent the collision. Plaintiffs also contend that the care and maintenance of the road leading to and across the tracks by the defendant was negligence on their part. Plaintiffs further theorize that the deceased's automobile slipped off the "wet, oily, slippery planking into the drainage ditch" and the left wheel was caught in the drainage hole; that she was stunned or rendered unconscious by the abrupt

vertical travel. A portion of the machine's weight is
and the springs are found approximately 10 to 15 feet from
the south side of the circle and the building.
It would appear that the most logical and reasonable inference
of the evidence is to be made from the evidence that the
defendant's automobile was stopped on the street, that it was
off the street on a public highway of the city and was
about 1 foot south of the street when defendant's car was
stopped 1400 feet from the building. However, we will assume
all possibilities as far as the evidence is concerned.
-Continued- It is clear that the evidence is such that
the jury could have found that the defendant's automobile was
stopped on the street; that it was not the defendant's car
such as to be in the evidence in the case and that it is
in such a position that the evidence is such that it is
that the defendant's automobile was not stopped there; and
especially in regard to the evidence in the case, it is
evident also that the evidence is such that it is
known as the record of the case by the defendant's witness
on their part. The defendant's witness testified that the defendant's
automobile stopped at the west side, although the evidence is
against it; but the fact that it is such as to be
that the evidence is such that it is such as to be such

stop and could not extricate herself before the train arrived, or, "that due to the heavy rain, fog, lack of warning, pock-marked approach, obscuration of vision and the need to watch for on coming cars across the embankment, caused her to approach the crossing so slowly and with such tremendous caution with her attention fixed elsewhere, she did not clear the crossing before she was struck".

From these facts the lower court found plaintiffs failed to prove any specific charges of negligence against the defendant. It must be first noted that the speed of the train in and of itself is not evidence of negligence on the part of defendants. Provenzano v. Illinois Central R. Co., 357 Ill. 192, 191 N.E. 287; Nice v. Illinois Cent. R. Co., 303 Ill. App. 292, 25 N.E. 2d 104. We cannot see how the question of speed as being the proximate and negligent cause of the accident could have been left to the jury. The train traveled only 50 miles an hour over open country within view of all, even in adverse weather. Under these circumstances operation of the train at the speed of 50 miles an hour can not be deemed to be negligence.

The same is true of the failure of the railroad to equip the crossing with a flashing warning light. This could hardly be called a factor that contributed to the accident. If we take the hypothesis of plaintiffs that decedent's automobile was traveling slowly across the tracks when struck, then we must

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. He or she will usually have a list of questions to ask the witnesses and the suspect. The first question is usually "What happened?" This is followed by "When did it happen?" and "Where did it happen?" The investigator will then ask the witnesses and the suspect for more details. The next step is the collection of evidence. This is done by the investigator who will search for any physical evidence that may be related to the case. This includes fingerprints, footprints, and any other items that may be found at the scene. The third step is the analysis of the evidence. This is done by the investigator who will compare the evidence to the known facts of the case. This includes checking the fingerprints against the known fingerprints of the suspect and checking the footprints against the known footprints of the suspect. The fourth step is the conclusion. This is done by the investigator who will determine if the evidence supports the hypothesis that the suspect is guilty of the crime. If the evidence does support the hypothesis, the investigator will usually recommend that the suspect be charged with the crime. If the evidence does not support the hypothesis, the investigator will usually recommend that the suspect be released.

assume that she did see or should have seen the train or the light on the engine. At 1400 feet the trainman could see the red tail lights of the car and at that point she certainly, if driving across the rails, should have seen the bright headlight of the train, had she looked. It is suggested that decedent could have been confused, thinking the light of the train was the light of an automobile approaching from the north on Route 45. There is nothing in the record from which such inference can be made. The presence of the train itself was sufficient warning of its approach.

Coleman v. Chicago, B. & O. R. Co., 287 Ill. App. 483, 5 N.E. 2d 103.

If we take the position that her automobile was stuck on the tracks and she was knocked unconscious, then the warning light would have been of no help. There is nothing in the evidence from which it can be inferred that decedent would have been deterred in her attempt to cross the tracks had a warning light in fact been flashing. She may have been on the tracks in this condition some time before the train would reach the point where it activated such signal. The evidence is totally lacking from which we can infer that the lack of signal lights or the speed of the train constituted negligence on the part of the defendant that was the proximate cause of the accident.

Plaintiffs suggest that defendant should have stopped the train immediately upon noticing the red lights in the vicinity of the tracks. It must first be noted that had the brakes been

of the (1911) and (1912) editions of the book, the
in the report the following information was given: The
resemblance appearing from the north on June 11, 1911, there is nothing
connected, showing the light of the light of an
and the tower. It is suggested that someone could have been
the walls, which have been the light of the light,
light of the tower at that point in the tower, it giving some
in the (1911) and (1912) editions of the book.

set at that point the accident would not have been avoided. The brakes were applied at 500 feet from the intersection and the train traveled a total of 1700 feet before stopping. It is obvious then that the train could not have been stopped even had the brakes been applied 1400 feet away from the intersection until the train collided with the car. It is suggested that damage might have been less had the brakes been applied at that point. This is pure speculation for it is clear that had this been done the train would have still traveled some 300 feet beyond the point of impact. We are not impressed by the argument, nor the authorities cited. In Janjanin v. Indiana Harbor Belt R. Co., 343 Ill. App. 491, 99 N.E. 2d 578, cited by plaintiff, the testimony established that the defendant could have seen the stalled automobile at a point 1400 feet distant and that it was traveling at 20 to 25 miles an hour. There was also testimony that the train could have been stopped at a point between 600 and 1100 feet after the brakes were applied. The court there said:

"If the jury believed that defendant's freight train was traveling 20 to 25 miles an hour as it approached the intersection, we think the jury could find that the crew members in the exercise of ordinary care could have prevented the collision by stopping the train before it reached the intersection."

In that case ample evidence was available from which favorable inferences could be drawn to permit the jury to consider the matter.

In the case at bar there is no evidence presented to show that the train did in fact stop or could have been stopped in less than the 1700 feet it actually took. Plaintiffs also suggest that the crew should have seen the car before the 1400 foot point, or should have seen it had they looked, yet, there is no proof from which such inference could be raised. The weather was foul and while it appears from the testimony that one could on a clear day see three miles down the track into Onarga, however, the testimony regarding weather and visibility illustrates that visibility was limited. But even should we infer that defendant should have seen the car before this, it must be conceded that the visibility of the crew would be no better at a great distance from the intersection than it was at 1400 feet. The crew would have seen no more than the two red lights near the track. It must be borne in mind that the position of the automobile was not ascertained by the crew until the train was 500 feet from it. Further it cannot be inferred that they knew the position of the car or that it was not moving or that it was stuck on the tracks at the distance of 1400 feet or further back. The question is then posed as to the duty of the defendant under these circumstances. It must be noted that a train has the right of way over automotive traffic at intersections like the one at bar. In Robertson v. New York Central R. R. Co., 388 Ill. 580, 58 N.E. 2d 527, the court said:

"The right of way (of the railroad) is necessarily one peculiarly inherent in the railroad in order to facilitate rapid operation of both freight and passenger trains, and the public should be held to a recognition of this right. When a railroad train and a person traveling on a highway each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is, instead, the duty of the traveler, in obedience to the known custom of the country, to stop and not pass in front of the advancing train." Carrell v. New York Central & Co., 384 Ill. 599, 52 N.E. 2d 201; Provenzano v. Illinois Central R. Co., supra.

In the Robertson case plaintiff's truck collided with a train and the court, in commenting on the duty of the railroad, said:

"The engineer had a right, when he first saw the plaintiff, to act upon the presumption that Robertson would do what a reasonably prudent man would do and refrain from going upon the track or putting himself in a place of danger. He, the engineer, was not required to stop the train until it became apparent that plaintiff had not heard or would not heed the signal."

Plaintiffs contend that the deceased could well have confused the lights of the train for an automobile coming from the north. This contention assumes an automobile or automobiles coming from the north. The record is barren of any evidence from which this assumption can be drawn.

Plaintiffs further contend that the holes in the railroad crossing may be deemed by the jury to be negligent maintenance of the crossing and the proximate cause of the injury. While it is conceivably true that negligent maintenance of a crossing may be sufficient evidence of negligence upon which to base a

finding against the railroad in a given case, the cases cited by defendant are not controlling nor in point. We are asked to infer that the decedent's automobile struck the holes in the approach or skidded on the planks across the track and thus caused the car to leave the road; or that the pitted road or slippery planks distracted her attention away from the moving train. From what has been said it is clear we cannot infer that an event happened in a particular manner without facts from which such inference can be drawn. The alternative theories of plaintiffs as to how the collision occurred indicate in themselves how unreasonable such an inference would be.

Along the same line plaintiffs say that defendant was negligent in its failure to maintain the right of way. The right of way was 32 feet in width, while the gravel road over the tracks was but 18 feet wide. Plaintiffs charge that failure to maintain the entire right of way was negligence. Section 62 of the Railroad and Warehouses Act (Chap. 114, Sec. 62, Smith Hurd Ill. Rev. St.) provides in substance that the approaches and crossings within its right of way must be maintained by the railroad. While the railroad has a duty to so maintain the right of way, yet this does not mean they must maintain the street or road over the entire width of such right of way. City of Bloomington v. Illinois

Cent. R. Co., 154 Ill. 539, 39 N.E. 478. Its only duty is to maintain the approach and the crossing for at least the same width as the intersecting traveled portion of the road. In the case at bar the railroad did at least this. The drainage ditch so close to the railroad crossing may have been the factor that prevented the deceased from extricating herself and the car from the tracks in time to avoid the collision but proof of this is lacking. Should we hold these facts were true, our findings would be based on pure speculation and not an inference from given facts. If the failure to properly maintain the crossing and its approaches causes an automobile to stall, this improper maintenance could well be the basis for recovery against the railroad. Before this liability can be attached we must of necessity be able to say or imply from the evidence that such facts exist.

As a final proposition plaintiffs note that they have made all proof of decedent's due care as was available. They cite Robinson v. Workman, 9 Ill. 2d 420, 137 N.E. 2d 804. The differences between the two cases are at once apparent. In the Robinson case the evidence of the willful and wanton misconduct of the driver of the car in which Robinson was killed was established and the main question was to establish who the driver of that car was, the defendant or the deceased. In the case at bar no evidence was presented from which this court can say that defendant was

negligent and that such negligence proximately caused the accident that led to the death of decedent.

We have undertaken to outline the evidence in detail when considered in a light most favorable to plaintiffs. In the final analysis the speculations, conjectures and mere possibilities which counsel for the plaintiffs would have us indulge in, is best illustrated by the following statement in their brief, to-wit:

"How did this collision occur? The left rear wheel... slipped from the narrow, oily, wet planking into the hole. This pivoted the car so that its two red lights were visible to the trainmen. They first saw these lights as much as 20 seconds before the collision. The crew never saw them move, so Mrs. Henegar had been there for some time. She was stunned by hitting her head on the inside of the car when it stopped suddenly and spun to its left...."

This statement is typical of all the contentions of counsel for plaintiffs by which it is sought to impose liability on the railroad for this unfortunate occurrence.

For the reasons stated herein the judgment of the Circuit Court of Champaign County will be affirmed.

Affirmed.

CARROLL, P.J. AND REYNOLDS, J., concur.

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48276

PRUDENCE MUTUAL CASUALTY COMPANY,)	
a corporation,)	
)	
Appellant,)	APPEAL FROM
)	
v.)	SUPERIOR COURT,
)	
WILLIAM W. DUNN, BILLIE JOE LINDSEY)	COOK COUNTY.
and RICHARD GUDZ,)	
)	
Appellees.)	

301A 2d 400

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sues for a declaratory judgment of non-liability on a \$10,000 judgment entered against one of its policyholders. The trial court entered a summary judgment, directing plaintiff to pay the judgment, and it has appealed.

On December 8, 1956, Richard Gudz, a minor, was injured by an automobile owned by defendant William Dunn, the named insured in an automobile liability insurance policy issued by plaintiff, Prudence Mutual Casualty Company. In a report to Prudence Mutual, Dunn stated that Billie Joe Lindsey was the driver of the automobile at the time of the accident, and that he, Dunn, was a passenger. Gudz sued Dunn and Lindsey for damages, alleging negligent operation of Dunn's automobile by Lindsey. The pleadings "admit" that Lindsey was the driver and Dunn the passenger.

In a jury trial, Dunn, called as an adverse witness, testified that Lindsey was the driver. The jury returned a verdict for \$10,000 against Dunn and Lindsey, on which judgment

was entered. After the trial ended, Dunn was sentenced to jail for contempt of court, because of conflicting statements made by him under oath and prior to the trial. Prudence Mutual mailed letters of liability disclaimer to Dunn and Lindsey on April 29, 30 and May 1, 1959.

Subsequent to the judgment in the basic action, Prudence Mutual filed the instant complaint for a declaratory judgment order, asserting that Dunn and Lindsey breached the co-operation clause and are not entitled to any protection or indemnity under said policy, and that it has no liability for the Gudz judgment. Dunn, Lindsey and Gudz were made parties defendant.

Lindsey defaulted. Dunn answered, admitting that, prior to trial, he had informed his attorney, Henry H. Caldwell, that his testimony would deviate from his prior statements that Lindsey was the driver, but that during the course of the trial before the jury, he, Dunn, testified that Lindsey was the driver, which was in accordance with his prior statements, depositions and advice of Caldwell, his counsel. For an affirmative defense, Dunn alleged that Prudence Mutual had waived any and all right to deny coverage to him by continuing to defend him at the trial. Gudz answered and counterclaimed on his \$10,000 judgment. Both Gudz and Prudence Mutual then filed motions for summary judgments with supporting affidavits.

The motion of Prudence Mutual for summary judgment was denied and that of Gudz was allowed. The summary judgment order, entered June 16, 1960, recites that the court considered the affidavits, answers and motions of the parties and heard testimony--(Henry H. Caldwell). The order directs Prudence Mutual, "on behalf of William Dunn and/or Billie Joe Lindsey," to pay to Gudz \$10,000, with interest from April 29, 1959. Judgment for that amount was entered in favor of Gudz and against Prudence Mutual.

The record shows that on April 25, 1959, the Saturday before trial, a conference was had between Dunn, Lindsey and Caldwell, the attorney retained by Prudence Mutual to represent Dunn and Lindsey in the Gudz trial. Dunn there stated for the first time that he, and not Lindsey, was the driver. He said that he had been drinking intoxicating liquors prior to the accident, did not want to have charges preferred against him, and paid police officers \$50 to report that Lindsey was the driver. Caldwell informed Dunn and Lindsey that in view of the new information that Dunn was the driver and not Lindsey, he did not know what the company's attitude would be, but he would report the conflicting statements to it, and Dunn and Lindsey should report for trial on Monday, April 27, 1959.

The trial started on April 27, with Dunn present. Lindsey had left town for Tennessee over the week end and failed

to appear at the trial, which ended April 30. Before the trial started, the court denied a motion by Caldwell to withdraw as attorney for Lindsey, because of his failure to appear for trial. After the noon recess, Caldwell informed the court of Dunn's statement made on Saturday, the 25th, that he, Dunn, and not Lindsey, was the driver. He then made a motion to withdraw as attorney for Dunn, and that the cause be continued so that Dunn could obtain other counsel. During the hearing of this motion and while under oath, Dunn again gave conflicting answers as to whether he was or was not the driver. After the motion was denied, Caldwell informed the court and Dunn that Prudence Mutual would bring an action for a declaratory judgment of non-liability.

On July 14, 1960, subsequent to the entry of the instant judgment, the trial court adjudged Lindsey in default and ordered that the instant complaint be taken as confessed against him. Lindsey's absence at the trial, not claimed to be collusive, does not here affect the issue of plaintiff's liability on the Gudz judgment against Dunn.

We think the principal question is whether the admittedly contradictory and variant statements made by Dunn, as to the identity of the driver, constitute a breach of the co-operation clause of the policy, sufficient to release Prudence Mutual from liability under the policy. The co-

operation clause states: "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits."

As stated in Allstate Ins. Co. v. Keller (1958), 17 Ill. App. 2d 44: Co-operation by an insured means that there shall be a fair and frank disclosure of information reasonably demanded by the insurer, to enable it to determine whether there is a genuine defense; the failure to co-operate must be material to the liability of the insured; false statements made by the insured to the insurer may be sufficient to constitute a breach of the co-operation clause on which a defense of nonliability may be predicated; and that determination does not require an actual showing of prejudice or detriment to the insurer. An initial false statement by the insured to the insurer, as to the identity of the driver, standing uncorrected for a period of time, has been held to be a breach sufficient to relieve an insurer from its obligations under the liability coverage of its policy. Standard Mutual Ins. Co. v. Kinsolving (1960), 26 Ill. App. 2d 180.

Dunn's trial testimony was consistent with his initial statement to the insurer and his deposition of March 3, 1959. An affidavit by Dunn, filed in opposition to the motion of

Prudence Mutual for summary judgment, admits the contradictory statements made to Caldwell and in court before the impaneling of the jury, but asserts that he made these contradictory statements because he believed that Prudence Mutual was seeking to avoid its policy coverage of the Gudz accident because a minor, Billie Joe Lindsey, was driving the car.

The record affirmatively shows that Dunn, prior to April 25, 1959, had been informed by Prudence Mutual that it wanted his waiver of coverage on the Gudz basic suit, because Lindsey, a minor, was driving the car at the time of the accident. Dunn's affidavit states that he told Caldwell that he was going to testify that he was the driver and not Lindsey, to prevent Prudence Mutual from denying coverage. Although Caldwell denied that Dunn at any time stated his motive, the trial court concluded that Dunn's motive for changing his story prior to the trial was known to Prudence Mutual. The trial judge remarked that he did not think that Prudence Mutual was deceived or that it changed its position because Dunn's variant statements were made at a time when he was being "pressed to sign some documents. * * * and during the five-day trial stuck to the original story that the company had heard." The judge stated that, under the circumstances, he felt Dunn should be protected.

We believe the record amply supports the conclusion of the trial court that Dunn's temporary change of story as to who was driving was not a breach of the co-operation clause suffi-

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cient to release Prudence Mutual from its liability under its policy for the Gudz judgment.

For the reasons stated, the judgment of the trial court is hereby affirmed.

AFFIRMED.

KILEY, P.J., AND BURMAN, J., CONCUR.

ABSTRACT ONLY.

48108

THOMAS E. LA DUKE,)	
)	
Appellee,)	APPEAL FROM MUNICIPAL
)	
v.)	COURT OF CHICAGO.
)	
ROY P. MORRISON,)	
)	
Appellant.)	

30 I.A.²¹ 434

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Thomas E. LaDuke, hereinafter referred to as the plaintiff, brought suit in the Municipal Court of Chicago for a balance of \$7,648.13 allegedly due him upon his commission account as sales manager in the real estate office of Roy P. Morrison, hereinafter referred to as defendant. The suit was based upon a certain contract, a copy of which was attached to the statement of claim. The defendant filed an answer denying that the sum of \$7,648.13 was due the plaintiff.

At the close of the plaintiff's evidence the trial court sustained plaintiff's motion for a directed verdict in the amount of \$1,271.21. At the close of all the evidence the trial court entered an order that a verdict be directed in the sum of \$3,377.81, which sum included the amount of \$1,271.21, which was the amount in the order for a directed verdict at the close of plaintiff's evidence. The case was then submitted to the jury with reference to certain disputed items. The jury returned a verdict in favor of the plaintiff and against the defendant for \$4,124.32. The court entered

judgments for \$3,377.81 and \$4,124.32 against the defendant, from which this appeal is taken.

The defendant filed a post-trial motion on January 25, 1960 in which he asked for a new trial. In that motion he alleged certain grounds generally and one ground specifically. On February 5, 1960 the court overruled the post-trial motion of the defendant. On February 11, 1960 the defendant filed in the trial court his notice of appeal. On April 1, 1960 the defendant filed a motion asking leave to file an amended post-trial motion, and on the same date the court entered an order, over the objection of the plaintiff, giving leave to the defendant to file an amended post-trial motion "nunc pro tunc, as of January 25, 1960, and that the Amended Post Trial Motion be and is hereby denied nunc pro tunc as of February 5, 1960." The latter post-trial motion made specific objections to various alleged errors of the trial court in the course of the trial.

This court must first determine the contention raised by the plaintiff that the court had no power to permit the defendant to file a post-trial motion--whether nunc pro tunc or otherwise--after notice of appeal had been filed and after thirty days from the date when the court had made its judgment final by denying the original post-trial motion of the defendant.

There is no question that the court lacked the power to enter its order, permitting the filing of the

amended post-trial motion and denying the same, nunc pro tunc.
As was said in Lindauer v. Pease, 192 Ill. 456, 61 N.E. 454:

"The office of an order nunc pro tunc is only to supply some omission in the record of an order which was really made but omitted from the record. If an order is actually made by the court but there is a failure to enter it, the court may correct the mistake in failing to enter the order, and make the record show the order which the court actually made as of the time it was made. No court has a right to create an order by that method or to supply an order which was never in fact made."

See also Clark v. Augustine, 342 Ill. App. 296, 96 N.E.2d 582, and Newport et al. v. McPherson et al., 198 Ill. App. 262.

The defendant urges that even though the court lacked the power to enter the order to permit the filing of the post-trial motion and to deny the same nunc pro tunc, nevertheless it had the power to allow the filing of it as an amendment and deny it as of the date when filed. That contention cannot be sustained.

That the trial court loses jurisdiction of the case when thirty days have expired from the final judgment therein is a rule established both by statute and by case law. After thirty days had elapsed from the time of the denial of the first post-trial motion the court had no power to vacate or modify its decrees, judgments or orders except as to matter of form or clerical errors. Parish Bank & Trust Co. v. Uptown S. & S. Co., 300 Ill. App. 73, 20 N.E.2d 634.

It is provided by statute and has been repeatedly held that before a reviewing court will consider errors argued

by the appellant those errors must have been raised specifically in the post-trial motion and passed upon by the trial court. The attempted amendment of the post-trial motion, so as to bring it within the scope of that rule, after thirty days have elapsed is beyond the power of the court and it is an attempted amendment as to matter of substance and not as to matter of form.

Section 76 of the Practice Act provides that an appeal is perfected by the filing of a notice of appeal in the trial court and that no step other than such filing is jurisdictional. When a notice of appeal is filed in the trial court the case proceeds in the court of review, not as a new case, but as a continuation of one that was pending in the trial court. The jurisdiction of the reviewing court to take the case attaches when the notice of appeal is filed in the trial court. Amer. Smelting Co. v. City of Chicago, 409 Ill. 99, 98 N.E.2d 710. It has been repeatedly held that after the perfection of an appeal by ^{the filing of} a notice of appeal in the trial court all further proceedings are stayed in the trial court. Matters of form could still be corrected below and the trial court could enter such orders as are directed by the statutes and rules of the Supreme Court with reference to carrying forward the appeal and could dismiss the appeal in case of failure of the appellant to comply with the rules. Brenza v. Jordan, 11 Ill. App.2d 140, 136 N.E.2d 571. The trial court is restrained from

entering any order which would change or modify the judgment or decree or the scope thereof. Lind v. Spanuth, 8 Ill. App.2d 442, 131 N.E.2d 796. The reviewing court could accept the filing of a supplemental record, which would be accepted only to the extent that it showed what had actually taken place before the time of perfecting the appeal. Ogden v. Town of Lake View, 121 Ill. 422, 13 N.E. 159. The only questions which could be considered by the reviewing court were those existing at the time when the notice of appeal was filed. Amer. Smelting Co. v. City of Chicago, supra; Cowdery v. Northern Trust Co., 321 Ill. App. 243, 53 N.E.2d 43, which cites Simon v. Balasic, 316 Ill. App. 442, 45 N.E.2d 98, as holding that after the notice of appeal was filed the trial court had no power to enter any order involving a matter of substance; Bollaert v. Kankakee Tile & Brick Co., 317 Ill. App. 120, 45 N.E.2d 506. See also Wolcott v. Village of Lombard, 387 Ill. 621, 57 N.E.2d 351. It has been held that a post-trial motion may be amended, but the furthest that the courts have gone is to permit the amendment during argument on the post-trial motion in the trial court. Taylor v. Hughes, 17 Ill.App.2d 138, 149 N.E.2d 393.

It is our opinion that we cannot consider anything except such matters as were raised in the original post-trial motion, and as the plaintiff points out in his brief, the only question which can be considered by us is as to

whether the court's order at the close of all the evidence for a directed verdict in the amount of \$3,377.81 is based on proper admissions by the defendant over and above the amount of \$1,271.21 which the defendant admits was supported by the evidence.

The trial court apparently found that the defendant made admissions in his pretrial deposition that he was indebted to the plaintiff in the sum of \$2,106.60 over and above the amount of \$1,271.21, which latter amount the defendant says in the post-trial motion is correct.

Before the trial of the case a discovery deposition was taken of the defendant by the plaintiff. Under rule 19—10 of the Supreme Court a discovery deposition may be used as an admission made by a party in the same manner and to the same extent as any other admission. The plaintiff devotes a considerable portion of his brief to arguing that the admissions contained in the deposition were "judicial admissions" and could not be contradicted by the defendant and that the rule applies whether the admissions were made in the actual trial of the case or in a pretrial deposition. In support of that contention plaintiff cites McCormack v. Haan, 23 Ill.App.2d 87, 161 N.E.2d 599. That case was reversed by the Supreme Court in McCormack v. Haan, 20 Ill.2d 75, 169 N.E.2d 239, in which the court corrects some unwarrantedly broad statements concerning "judicial admissions" appearing in other opinions of our courts. The court says (p. 78):

"Of course a party may, by his own testimony, conclusively bar his claim or his defense. But a determination that he has done so depends upon an evaluation of all of his testimony, and not just a part of it. It depends, too, upon an appraisal of his testimony in the light of the testimony of the other witnesses and a consideration of their respective opportunities to observe the facts about which they testify. McCormick on Evidence, pp. 513-516; 9 Wigmore on Evidence, 3rd ed., sec. 2594(a)."

The plaintiff also cites Meier v. Pocius, 17 Ill.App.2d 332, 150 N.E.2d 215, which merely holds that an admission made in a pretrial deposition submitted in support of a motion for summary judgment and which is uncontradicted by counter-affidavits is binding on the plaintiff. The rules generally applicable to admissions apply to the admissions under discussion here, which were contained in the pretrial deposition. In the case before us, the defendant while on the stand was asked as to whether or not the plaintiff was in his opinion entitled to commissions on four properties, all of which were of necessity involved in the \$2,106.60; one of the items for which verdict was directed at the close of all the evidence. In response to those questions the defendant stated that the plaintiff had no right to the commissions. In the pretrial deposition apparently the defendant had stated that the plaintiff was entitled to the commissions. On the trial counsel for the plaintiff asked the defendant as to whether the questions involving the four properties were propounded to him at the time the deposition was taken and as to whether or not he made the alleged answers, and concerning three of the four properties, he stated in

effect that he did not remember. Under those circumstances in order for the deposition to have the effect of an admission concerning the three properties there must be proof submitted that the deponent answered the questions in the deposition in the manner and form as therein set out. No such proof was made. Under the circumstances before us it was necessary to prove the deposition in the same manner as testimony taken in a former hearing in the same case would be proved. Without such proof the trial court had no right to treat any alleged statements made in the deposition as admissions on the part of the defendant concerning the sales commissions therein mentioned.

Both the plaintiff and the defendant have in their briefs elaborate tables concerning the admissions and what in their opinion is a proper evaluation thereof. In the crucial items the tables are in sharp conflict. After a careful analysis of the mathematical computations of plaintiff and defendant the court does not feel that either side could qualify for honors in a course in mathematics. The trial court had found that the defendant in his pretrial deposition had admitted certain commissions as due plaintiff by him. The amount thus found by the trial court to be due was excessive in view of the fact that he treated as admissions statements allegedly made by the defendant in the pretrial deposition.

At the time the contract was entered into the

plaintiff was indebted to his former employer in the sum of \$408.99, and in the contract it is stated that any money owed by the plaintiff to his former employer will be paid by the defendant "in consideration for" the plaintiff entering into the contract. The contract also contains a further provision that the defendant at the time of the signing of the contract gave the plaintiff \$1,000, for which he gave the defendant a note, and the contract also further provides that if the plaintiff's earnings are \$15,000 or more within one year from the date of the execution of the contract he is to pay back the \$1,000 and his cancelled note will be returned to him. It is the contention of the defendant that the plaintiff left the employ of the defendant before the expiration of the year and that consequently under the contract provisions he owed \$1,000 to the defendant. He also contends that the amount of \$408.99, which was paid by the defendant to the former employer of the plaintiff, should be set off against plaintiff's claim for commissions against the defendant.

The plaintiff contends that under the terms of the contract he was entitled to a 20% sales manager's commission on all sales made by salesmen in the defendant's office. The defendant contends that he was only entitled to 10%. The court submitted to the jury that question, together with the alleged right of setoff on the part of the defendant of the \$1,408.99 against the plaintiff's commissions, and also as to whether or not the plaintiff was entitled to any

remaining commissions whatsoever. The verdict of the jury was in favor of plaintiff on all these points.

The court was in error in finding that there were admissions in the record justifying his direction of a verdict for \$3,377.81. The trial court entered two judgments, one based on a finding made by the court against the defendant in the sum of \$3,377.81, the other based on a verdict of the jury finding in favor of the plaintiff and against the defendant in the sum of \$4,124.32.

The court entered an order directing a verdict in favor of the plaintiff for \$3,377.81. No verdict was given to the jury. We are aware that it has been held that where the trial court has sustained a motion for a directed verdict it is not error for the court to enter the verdict without a formal submission to the jury, since the rendition of the verdict by the jury as directed is a mere formality. Johnson v. Bennett, 395 Ill. 389, 69 N.E.2d 899. The court had a right to enter two judgments in the case. Zimmerman v. Bankers Life & Casualty Co., 324 Ill. App. 370, 58 N.E.2d 267. The procedure in the case before us was highly informal, but standing alone it would not be reversible error.

Since the case must be reversed and remanded for a new trial, in order to clarify a ruling on an objection which might occur in the second trial we will discuss it even though it was raised only in the amended post-trial motion.

The defendant had offered to show that at the

time when the plaintiff received his first commission check he was given a typewritten copy of certain figures by the defendant's bookkeeper, together with her oral explanation of the method used in computing his first commission check. The figures would have indicated that the plaintiff's commission was less than he claimed at the trial. The court refused to admit this evidence. It is our opinion that the evidence should have been admitted. The plaintiff misapprehends the purpose for which it was offered. It was not an attempt to show the contents of an account book by the submission of an abstract thereof. Nor was it an attempt to show that the figures contained in the memorandum supported by the oral testimony of the bookkeeper were accurate and correct. The only purpose of offering it was to raise a factual issue before the jury as to whether or not the plaintiff had received the memorandum with his check and had had the alleged conversation. The plaintiff denies both receiving the memorandum and having the conversation. If the jury had found that there was such a memorandum and conversation, and that the plaintiff accepted the check making no objections to the defendant's computations as evidenced in the memorandum and the conversation, such acceptance could be treated as a tacit admission on the part of the plaintiff as to the correctness of the computations made by the defendant. Butler v. Cornell, 148 Ill. 276, 35 N.E. 767; Greenburg v. Childs & Co., 242 Ill. 110, 89 N.E. 679.

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The judgments of the Municipal Court of Chicago are reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

Reversed and Remanded.

Schwartz, P.J., and Dempsey, J., concur.

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